UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

No. 53.

THE AMERICAN BELL TELEPHONE COMPANY,

DEFENDANT, APPELLANT,

v.

THE WESTERN UNION TELEGRAPH COMPANY ET AL.,

COMPLAINANTS, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FROM FINAL DECREE (COLT, J.), NOVEMBER 26, 1892.

CERTIFIED COPY

OF

RECORD AND ALL PROCEEDINGS IN SAID CAUSE, TO AND INCLUDING NOVEMBER 13, 1895.

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DEFENDANT, APPELLANT,

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM FINAL DECREE (COLT, J.), NOVEMBER 26, 1892.

APPEARANCES OF COUNSEL:

WILLIAM G. RUSSELL,
JAMES J. STORROW,
for Defendant, Appellant.

JOHN F. DILLON,
JOSIAH H. BENTON, JR.,
for Complainants, Appellees.

TRANSCRIPT OF RECORD

OF THE

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED IN CLERK'S OFFICE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND CASE DOCKETED JANUARY 9, 1893.

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Before

THE HONORABLE WILLIAM L. PUTNAM,
Circuit Judge.

No. 1943, Equity.

THE WESTERN UNION TELEGRAPH COMPANY ET AL, *Complainants*,

v.

THE AMERICAN BELL TELEPHONE COMPANY, *Defendant.*

The Bill of Complaint in this cause was filed in the clerk's office of this Court on the sixteenth day of November, A. D. 1883, and was duly entered at the October Term of this Court, A. D. 1883, when and where the parties appeared by their respective attorneys, and is as follows: —

(1) BILL OF COMPLAINT.

[FILED NOV. 16, 1883.]

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

THE WESTERN UNION TELEGRAPH COMPANY, THE AMERICAN SPEAKING TELEPHONE COMPANY, THE GOLD AND STOCK TELEGRAPH COMPANY AND THE HARMONIC TELEGRAPH COMPANY, *Complainants*,

v.

THE AMERICAN BELL TELEPHONE COMPANY, *Defendant.*

To the Honorable the Judges of the Circuit Court aforesaid, in Chancery Sitting:

Humbly complaining unto your Honors, your Orators, the Western Union Telegraph Company, the American Speaking Telephone

Company, the Gold and Stock Telegraph Company, and the Harmonic Telegraph Company would respectfully represent: that on and before the tenth day of November, A. D. 1879, each of your complainants was, and from thence hitherto has been, and still is, a body corporate and politic, organized and existing under and by virtue of the laws of the State of New York; and that each of said complainants was during all said time, and still is, a citizen and resident of said State of New York.

That on and before the said tenth day of November, A. D. 1879, your orator, the Western Union Telegraph Company, was, and still is, largely engaged in the business of telegraphing, owning or controlling many thousands of miles of telegraph lines, extending into almost every portion of the United States sufficiently settled to need telegraph service; and that said telegraph company, during all said time, continued and still continues to extend its lines to meet the requirements of the business of the country. That before and on said last named day said Western Union Telegraph Company and the other complainants herein were also engaged in the business of transmitting messages by telephone, and were making great efforts to extend such business in connection with their respective telegraph systems. That said last named companies at said time owned a large number of instruments, appliances and plant, and a large quantity of supplies, all more or less useful in the prosecution of the business of sending messages by telephone.

That on and before said tenth day of November, A. D. 1879, and for a long time before that day, said Western Union Telegraph Company owned or controlled a number of patents issued by the Government of the United States, covering and embracing a number of valuable inventions, appliances and methods useful in the art of transmitting messages by telephone, including the right to transmit call signals by electricity over wires in connection with its business of transmitting messages by telephone, and your orators, the co-complainants of said Western Union Telegraph Company herein, at the same time owned and controlled certain other patents covering other valuable inventions, appliances and methods, also useful in said telephone business.

That before said tenth day of November, A. D. 1879, a number

of organizations had been established in various parts of the United States called Telephone Exchanges, each of which formed a local body or company intended to furnish telephone facilities to its members or customers within limited areas; that the right to engage in such business being covered by Letters Patent of the United States, such exchanges could only engage therein by obtaining the necessary privileges from the owners of the patents covering the same. That before said last named day the Western Union Telegraph Company and the other complainants herein had entered into many valuable contracts with a number of telephone exchanges (and with individuals also) by which licenses were granted to such exchanges and individuals to use telephones, and the various appliances, methods and inventions aforesaid, owned or controlled by your orators, and in consideration of the grant of such licenses the parties receiving the same agreed to pay certain rentals or royalties to your orators. That on the tenth day of November aforesaid many such contracts were in existence, and your orators were drawing therefrom large revenues.

Further complaining, your orators show unto your Honors that on the day and year last aforesaid your orator, the Western Union Telegraph Company, was largely interested in the capital stock of the other complainants herein, owning and holding a considerable portion of the shares of capital stock of each, and said Western Union Telegraph Company was authorized to represent each of said other complainants in the manner hereinafter stated, and in negotiating and executing the written agreement hereinafter referred to as having been entered into on said tenth day of November, A. D. 1879.

Your orators further show unto your Honors that at the time of the execution of said agreement and for a long time prior thereto, there existed a certain other body politic and corporate called the National Bell Telephone Company, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts. That said National Bell Telephone Company has, since the day last aforesaid, transferred all of its property and rights to the American Bell Telephone Company, likewise a corporation organized under and by virtue of the laws of the State of Massachusetts, and

the said last named company assumed all the obligations and duties of the said National Bell Telephone Company, including its obligations under said contract of Nov. 10, 1879. The said American Bell Telephone Company is a citizen and resident of said State of Massachusetts. And complainants make the said American Bell Telephone Company defendant to this Bill of Complaint and will for convenience hereinafter refer to said company, whether with reference to its actings and doings under its former or under its present name, as the "defendant" or the "defendant company".

That at the date aforesaid the said defendant owned or claimed to own a number of patents derived from and granted by the United States, covering certain instruments, inventions or methods useful and valuable in the art of transmitting messages by telephone; and also claimed the right to transmit call signals by electricity over wires, in connection with its telephone system.

That before the day last mentioned the defendant had entered into various contracts with a number of telephone exchanges in various parts of the United States, and also with a number of individuals, by which the defendant had, in consideration of certain rentals and royalties, granted to such exchanges and individuals the right to use the instruments, inventions and methods aforesaid, so claimed to be secured to defendant by Letters Patent.

Further complaining, your orators would also represent to your Honors, that before the tenth day of November, A. D. 1879, a great controversy arose between your orators and said defendant, with respect to the rights and powers of each, and of the grantees of each, in the business of transmitting messages by telephone. Your orators and the defendant were severally engaged in licensing local telephone exchanges in various parts of the United States, and each claimed that its own exclusive rights, under Letters Patent, were infringed by the use of the instruments, inventions and methods so licensed by the other. So far was said controversy carried, that a number of suits were commenced in various parts of the United States by each of said parties against the other, and a vast number of such suits were threatened and their prosecution almost certain.

That in order, if possible, to avoid a great multiplicity of suits in

all parts of the United States, and to avoid all the loss and injury that must arise to all parties concerned, from a continuance of said controversy, the Western Union Telegraph Company, on its own behalf, and also on behalf of its co-complainants herein, entered into negotiations with defendant for a settlement and adjustment of all said matters of controversy. And such steps were taken that on said tenth day of November, A. D. 1879, an agreement in writing was entered into by and between said Western Union Telegraph Company on its own behalf, and on behalf of its co-complainants, as party of the first part, and the defendant, then existing under the name of the National Bell Telephone Company, as party of the second part. Your orators further show that said agreement in writing was not only executed, but was ratified and approved by all the parties.

And your orators file herewith a true printed copy of said agreement in writing, and also printed copies of certain schedules referred to therein, and marked respectively A, B, C, D and E, and also certain printed copies of the certificates of the approval of said contract by the parties thereto, and your orators mark said contract and the said papers attached thereto by the general description of "Contract of November 10th, A. D. 1879", and make the same parts of this Bill of Complaint. And your orators pray that said contract and papers be taken as parts of this bill, and that they be permitted to refer to the same as fully as if such contract and papers were copied at large herein.

Further complaining, your orators would also show that by the terms of the first paragraph of Article 1 of said agreement, the defendant company, being the party of the second part, agreed and bound itself to the party of the first part to pay to said party of the first part, as follows: —

"Upon all telephones used in the United States under any license from the party of the second part, express or implied, unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received, or rated as paid in accordance with the provisions of this contract, from licenses or leases for speaking telephones (exclusive of call bells, batteries, wires and other appliances furnished or performed), the rentals or royalties

upon which said royalty or bonus to be paid to the party of the first part is to be reckoned, shall, for that purpose, be ascertained by deducting from the gross rental or royalty received, or rated as hereinafter declared, the commissions and allowances hereinafter provided for."

By the terms of Article 17 of said agreement, the same was to go into effect as of the first day of November, A. D. 1879, and continue in force for a period of seventeen years thereafter, but many of the rights, obligations and duties of the parties to said contract, were subject to various qualifications and limitations, as to time and place, as to which qualifications and limitations, if material or relevant to the subject of this complaint, reference is hereby made the to said contract itself, and the terms thereof, as shown by the copy made part hereof as aforesaid.

And your orators show that by the terms of said agreement the party of the first part therein, on behalf of all the complainants, and in consideration of the undertakings and agreements of the party of the second part, as set forth in said contract, agreed with the party of the second part, among other things, as follows: —

"ARTICLE 4. (1) The party of the first part shall bear and pay twenty per cent, and the party of the second part eighty per cent. of all reasonable legal expenses incurred in ascertaining, investigating and determining, and in prosecuting and defending rights which the party of the second part may have, claim or wish to acquire, pertaining to telephones or the right to use telephones, or to inventions used in telephones, and concerning patent rights which it or others may claim respecting the same, including expenses in suits and in proceedings in the Patent Office relating to such rights or to the collection of rentals or royalties on telephones. Expenses incurred in whole or in part in respect to inventions or improvements which are or may be used otherwise than in telephones, shall be apportioned, and such part thereof as may be justly chargeable to the telephone interest shall be borne by the parties hereto in the proportion above stated, and such part thereof as shall justly be chargeable to other interests shall be borne by the owners thereof.

(2) The party of the second part may, from time to time, acquire such inventions and improvements in telephones as it shall deem ad-

visable, and may introduce such of them as it sees fit into the construction of telephones put out to its licensees, and to reimburse itself for the cost thereof, may charge an additional price to its customers beyond the price then previously charged, but such an increase shall not operate to increase the royalty or bonus payable to the party of the first part hereunder until said second party shall have been so reimbursed, unless said first party shall elect and assent to bear and pay twenty per cent. of such cost. Or if the party of the second part shall deem it advisable not to raise the price as aforesaid, then the party of the first part shall bear, pay and be charged with twenty per cent. of said cost actually and in good faith incurred and paid, and the party of the second part shall bear, pay and be charged with eighty per cent. thereof. *Provided*, that if such payments are for rights which extend beyond the duration of this contract or which are to be applied to purposes other than telephonic, then only a *pro rata* proportion, according to time or the purpose for which they are used, shall be borne by said first party. *And provided* further, that if the purchase of any one patent calls for an absolute payment exceeding $10,000, no portion of the excess over that sum shall be charged to the party of the first part unless it shall consent (and full opportunity shall be afforded it to do so) or it be determined by the board contemplated in Article 2, or by some other competent tribunal, that it should be so charged in respect of such excess; and said board shall so determine if, or so far as they shall find that said purchase was prudently made for the benefit of the parties hereto. Said second party shall call for said reference, and the referees shall be appointed, and such proceedings shall be had in reference thereto as are provided in said Article 2, so far as they can apply; and the questions submitted by the notice calling for said reference shall be determined by the default of the party or the decision of the referees, as therein provided; and the determination so arrived at shall be final and conclusive upon the questions so submitted.

ARTICLE 5. (1) The party of the first part, for itself and those it represents, as aforesaid, hereby grants to the party of the second part, as far as they or either of them have the legal power so to do, an exclusive license during the full terms for which patents thereon

have been or may be granted, to make, to use, and to license others to make and to use in speaking telephones, call bells, and switches, and other appliances for use on telephonic lines any inventions or improvements therein which it, or those whom it represents, as aforesaid, now own or control, in whole or in part, by contract or otherwise, under which it or they have the authority to grant such license, and whether already patented or not, and which the party of the second part shall not otherwise have the right to use; reserving, however, to the party of the first part, and those it represents, the right to use said inventions in switches, call bells, and appliances other than telephones in connection with the telephones which they are or may become entitled to use under this contract. Instruments or apparatus made under this license shall be deemed to be licensed only for the uses above named, and not for any other purpose.

(2) And the first party further agrees to acquire any further inventions adapted to be used in connection with telephones which it may have the right to so acquire under existing contracts with George M. Phelps and Thomas A. Edison, and to license the second party under the same for use in telephones or on telephone lines, the second party agreeing to pay to said first party in reimbursements, whatever the said first party, or those it represents, may be required to pay therefor under the ninth, tenth, eleventh and thirteenth clauses of the agreement between Thomas A. Edison and the Western Union Telegraph Company, dated May 31st, 1878, and whatever it may be required to pay said Edison under the contract between the same parties, dated May 12th, 1879, and whatever it may be required to pay George M. Phelps in addition to his salary of $3,300 therein referred to, to acquire his inventions under the contract between him and the Western Union Telegraph Company, dated January 20, 1876, or a due and proportionate part thereof, in case said inventions shall also be applicable to uses and purposes other than telephonic, said licenses to be exclusive during the term of this contract and to continue, but not to be exclusive, thereafter; the character and extent of such license shall be taken into account in arriving at a fair proportion of the actual cost thereof.

(3) And if the parties of the first part shall hereafter acquire ownership or control as aforesaid of other inventions adapted to be

used in connection with telephones, the second party shall have the right or license to use the same for telephonic purposes, and shall be bound to pay to the party of the first part the cost thereof, or a due and proportionate part of said cost. Such right or license shall be exclusive for telephonic purposes during the whole period of this contract, and shall continue, but shall not be exclusive after its expiration; the character and extent of such license shall be taken into account in arriving at a fair proportion of the actual cost thereof."

"ARTICLE 6. Except as herein provided, the first party and the companies it represents agree to withdraw from the manufacture, rental and use of telephones.

ARTICLE 7. The party of the first part agrees to give assistance and co-operation in developing and extending the use of the telephones of the party of the second part; and that the party of the second part shall, during the term of this contract, and when in the judgment of the first party it shall not interefere with the enjoyment and use of the same by said first party for telegraphic purposes, have permission to build lines under any franchises, contracts, licenses or rights of way enjoyed or controlled by the party of the first part; or to use any poles, fixtures, structures or plant of said first party, upon reasonable terms, subject, however, to a revocation of such license to use any poles, structures, fixtures or plant at any time, by reasonable notice to the party of the second part."

Your orators further show that said contract took effect substantially at the time therein stated, and the parties thereto assumed to keep and observe the same. That the Western Union Telegraph Company and all the other complainants represented in said agreement, did withdraw from the manufacture, rental and use of telephones and from the telephone business generally to the extent required by the terms of the agreement, and particularly required by Article 6 thereof; and all said complainants have, since the date of said agreement, abstained from such manufacture, rental or use of telephones, from the establishment and maintenance of telephone exchanges and private telephone lines and from the telephone business generally, to the extent required by said agreement.

And your orators further aver that they have in all things kept and performed the stipulations of said contract, so far as any duties have arisen thereunder, and they expect and intend to keep and perform all such of said stipulations as shall hereafter mature. That said Western Union Telegraph Company has well and truly paid to the defendant company all such sums of money as were from time to time required to be paid under said contract, and more particularly under the terms of Article 4 thereof, and said defendant has claimed and enjoyed great advantages therefrom.

That said Western Union Telegraph Company has duly turned over and transferred to the defendant company all patents and devices relating to telephones coming under the control of said Western Union Telegraph Company, as required by Article 5 of said contract, and has duly refrained from acquiring such patents and devices, excepting as required and permitted by said contract, and for the benefit of the defendant company.

And orators also aver that, ever since the execution of said contract, the defendant company has enjoyed great benefits and advantages from the grants contained in Article 5 of said contract, and is still enjoying the benefits of such grants.

But, may it please your Honors, said defendant, notwithstanding the benefits and advantages so enjoyed by it under said contract, does not keep and perform its own obligations arising under said agreement. But on the contrary the defendant has pursued and is pursuing a course of conduct by which it wrongfully and fraudulently seeks to escape from and avoid its obligations aforesaid to pay to your orators the royalty or rentals specified in said agreement to be so paid.

And your orators aver that, at the time said contract went into force, it was deemed for the advantage of both the parties thereto that the rentals or royalties to be charged by the defendant should be of comparatively small amount until the use of the telephones should become general, and the right of the parties to said contract to control the use of the same should be better established. That, since said contract went into force, the use of telephones has become general throughout the United States; the business of the telephone exchanges has become well established, and the rights of the parties

to said contract to control the use of telephones and telephonic instruments has been confirmed by numerous judicial decisions. That it has thus become practicable, and it is for the interest of the parties to said contract that the rentals or royalties paid to defendant for the right to use telephones and telephonic instruments, for exchange and other purposes, should be fixed at a higher rate than formerly.

And your orators further aver that the rate of rental and royalty charged by defendant to corporations or individuals for the right to use telephones and telephonic instruments, for exchange and other purposes, has in a great number of cases actually been increased, and such increased rentals or royalties have been, or are about to be, actually received by defendant.

Your orators further aver that, under the provisions of the contract aforesaid, your orators are entitled to twenty per centum of such increased rentals or royalties, after making the proper deductions under the terms of said contract.

But, may it please your Honors, the defendant, wrongfully and fraudulently seeking to avoid its obligations under the said contract to pay to your orators their proportion of said increased royalties or rentals as in said contract stipulated, has contrived and sought to conceal said increase of royalties and rentals and to disguise the real nature of its transactions, as hereinafter shown.

And your orators, further complaining, state and aver that since said contract was made and went into force the defendant has, in disregard of its obligations toward your orators, granted to many persons, corporations or telephone exchanges the right to use telephones and their appliances within the United States or portions thereof, and has accepted in lieu of, or in partial lieu of royalty or rentals payable in money for such use, stocks or valuable paper, interests, or property sold and delivered to itself exclusively, and has refused, and still refuses, to account to your orators therefor, or to recognize the right of your orators to any part thereof. That said defendant intends to continue to make and multiply such contracts, taking to itself such proportion as it pleases of the royalty arising from the grant of the use of telephone privileges for exchange and other purposes, within the United States or portions thereof, in prop-

erty other than money, and refusing to account to your orators, or to pay them any portion of such property, or any money equivalent therefor. Your orators do not know in how many instances such contracts have been or may be made, nor have they any means of knowing the nature and extent of the privileges granted in consideration thereof, nor of the kind, description and value of the paper, stocks or property received or to be received by the defendant under such contracts, except as hereinafter stated. But your orators allege that all such contracts are frauds on their rights, and palpable breaches of the aforesaid agreement of November 10th, A. .D 1879. And that your orators are in equity entitled to have all such contracts as are now in existence fully investigated, and to demand and receive from the defendant full compensation for the injury thereby inflicted on them.

Your orators further show that the instances in which said defendant has made such contracts as the contracts herein complained of are so numerous that your orators cannot have them fully investigated without obtaining discovery of all necessary information from the defendant and its proper officers, and that one of the purposes of this bill of complaint is that of praying for and obtaining such discovery.

Your orators further aver, upon information and belief, that in and by each of said contracts herein complained of, it was agreed substantially as follows, to wit:

The defendant granted to a person or corporation therein named, hereinafter for convenience called the licensee, the right to use telephones for exchange and private line purposes within certain territory in the United States, and in consideration thereof said licensee agreed to pay to defendant certain rental or royalty in money, and also to give and transfer to defendant three-tenths interest in said licensee, and all its property, rights and profits. And it was distinctly provided by said agreement that in addition to said rentals and in payment therefor, said licensee shonld forthwith deliver and transfer to the defendant company three-tenths of the whole of the capital stock of the said licensee. That in the event of an increase of the said capital stock, a like proportion of such increase should also be delivered and transferred to defendant, and that all the stock required to be deliv-

ered to defendant under the terms of said agreement should be free from all assessments and contributions.

Orators further aver that the only real consideration for the transfer and delivery of said stock to the defendant was the grant by the defendant to said licensee, of the right to use telephones for exchange purposes within a part of the United States, and that said stock was in fact a portion of the royalty paid by said licensee, for such telephone privileges, under license from defendant; and that no other consideration for said stocks or property appears upon the face of said contracts or any of them.

And your orators allege that each and every of said contracts was entered into without the consent of your orators, and the same have been and are now being carried out by the parties thereto, thus defrauding your orators of their just rights.

Further complaining, your orators would show unto your Honors that by the terms of paragraph 1 of Article 13 of the aforesaid agreement of November 10th, A. D. 1879, it was provided as follows: "The right to connect telephonic districts or exchange systems for the purposes of personal conversation between persons at the instruments, and the right to use telephones on all lines not forming part of a telephonic district or exchange system for such personal conversation (except so far as licenses for private lines are to be granted to the party of the first part under Article 14), are to remain exclusively with the party of the second part, and those licensed by it for the purpose."

And the said defendant, since the execution of said contract of Nov. 10, 1879, has, in many instances (the number and extent of such instance being unknown to your orators) granted to various parties, and in many cases to parties other than those already holding exchange or private line licenses, the right to connect telephonic districts or exchange systems, and has licensed the use of telephones in communicating between the exchanges or telephonic systems so connected. And for such special licenses, and such special use of telephones and appliances, the defendant has received and is now receiving large royalties or rentals. Yet the defendant utterly refuses to account for, or pay to your orators, any portion of such royalties and rentals, or any percentage or part thereof, but on the

contrary claims the right and avows the intention to appropriate to its own use all money that may be derived from such sources under existing contracts or such as may be entered into hereafter.

And your orators aver that such course on the part of defendant is a fraud upon the rights of orators, and, if persisted in, will inflict great injury upon orators; that orators cannot, without discovery obtained from defendant in this proceeding, properly investigate or fully show in what instances, or in what localities, or to what extent, the defendant has made contracts of the character last aforesaid, or what revenues, property or advantages it has derived therefrom.

And your orators would respectfully represent to your Honors, that as to the several matters herein complained of, they are without an adequate remedy under the strict rules of law, and that unless such remedy be afforded by equity, your orators will suffer great and irreparable injury from the wrongs already inflicted, and intended to be continued by defendant, and your orators greatly need the aid of the preventive powers of the Court, as well as its power to enforce compensation.

And your orators further show that under the terms of said agreement of Nov. 10, A. D. 1879, while orators have a large and substantial interest in the rentals and royalties aforesaid, the defendant controls the making of contracts with respect thereto, and the collection and division of such royalties and rentals. That under said contract great trust and confidence was reposed in defendant by orators, and defendant, as to the making of contracts for such royalties and rentals, is in law and equity a trustee for orators, and bound to account as such.

That, if your orators were compelled to seek relief at law against defendant for the wrongs herein complained of, it would be necessary for orators to institute a large number of suits from time to time, and thus greatly multiply litigation; and from the peculiar nature of the wrongs complained of, and the limited knowledge of orators with respect thereto, the damages suffered by orators could not be adequately measured or shown under the rules of the common law.

Wherefore, your orators pray your Honors to take cognizance of this bill of complaint, and entertain the same. That the defendant

be required to answer each and every allegation hereof on the oath of such of its general officer or officers as may be most fully informed touching the matters herein set forth, answer on oath not being waived. That the defendant be also required to answer in like manner, fully and distinctly, the following specific interrogatories, and to disclose and make discovery of the information therein demanded, to wit:

First. Have you, since the tenth day of November, A. D. 1879, entered into any contracts or agreements, written or otherwise, by which you granted to any person, natural or artificial, the right to use telephones or telephone appliances for exchange purposes, in any part of the United States, and in which contracts it was also stipulated that you should receive from such person any securities, paper, stocks, or property of any kind other than money? If so, state the amount and character of all such stocks, securities, paper and property, and for what consideration other than the grant of license in such contract contained, was such payment agreed to be made.

Second. Have you, since Nov. 10, A. D. 1879, entered into any contract or contracts with any persons or corporation, by which you have received, or are to receive any stocks, property, papers or securities, other than money, in which contract or contracts you granted to any person or corporation the right to use telephones, or telephonic appliances for exchange or other purposes, within any part of the United States? If so, please state in what instances, and give the terms of such contracts and copies thereof, if in writing. Please also state the par value, of all such paper, stocks or securities, and the actual value of such property other than stocks and securities at the time you received the same. Please give all such particulars respecting such contracts as may be necessary to a full understanding of the same.

Your orators pray that your Honors will order and decree that an account taken of the amount and value of all stocks, paper, securities, moneys or property received by the defendant since the tenth day of November, A. D. 1879, in consideration, or part consideration, of the grant by defendant to any person or persons, of licenses to use telephones or telephonic appliances for exchange or

other purposes in any part of the United States, or in pursuance of any contract by which defendant has granted to any persons or corporations the right to use telephones or telephonic appliances for exchanges or other purposes within any part of the United States. That when such account shall have been taken the defendant be compelled by decree of this Court to transfer and deliver and pay to orators such share of the stocks, papers, securities, moneys and property so received by defendant as will equal the percentage of royalty or rentals which should have been paid to orators under said contract of Nov. 10, A. D. 1879, and which was withheld by defendant as aforesaid, together with such dividends as may have been received by the defendant thereon, with interest on each item from the time when the same should have been paid or delivered to orators. That defendant be required to give a full account of all moneys, and the amount and value of all other property received by it since Nov. 10, A. D. 1879, in consideration of, or as royalties or rental for, the connection of telephone exchanges or telephonic systems in the United States and the use of telephones in connection therewith. That your Honors will also decree that the defendant pay to orators such sum of money as orators may be entitled to as their percentage of royalties arising from the said grants so made by the defendants of the privilege of connecting telephone exchanges or systems, with interest thereupon from the times when the defendant received such royalties.

Your orators would further pray that until a final hearing herein, your Honors will grant a temporary injunction restraining the defendant from entering into any further contracts with any person or persons, natural or artificial, without the consent of orators, by which stocks, paper, securities or property of any description, other than money, shall be accepted by defendant, in whole or in part, as royalty or rentals, in consideration of or for the grant of any license or licenses to any person or persons whatever of the right to use telephones or telephonic appliances in any portion of the United States during the time when said contract of Nov. 10, A. D. 1879, shall, by the terms thereof, remain in force. That upon a final hearing herein your Hon rs will adjudge and decree that said injunction be made perpetual.

And your orators pray such other and further relief in the premises as the nature of their case may require, and as may, to your Honors, seem consistent with equity and good conscience.

And may it please your Honors to grant unto your orators, not only a writ of injunction restraining the defendant from entering into any further contracts as aforesaid; but also that a writ of subpœna be directed to the said the American Bell Telephone Company, thereby commanding it at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there full, true and perfect answer make to all and singular the premises, and further to stand to, perform and abide such further order, direction and decree therein as to this Honorable Court shall seem meet.

And your orators will ever pray, etc.

THE WESTERN UNION TELEGRAPH COMPANY,
by NORVIN GREEN, *President.*

THE AMERICAN SPEAKING TELEPHONE COMPANY,
by NORVIN GREEN, *President.*

THE GOLD AND STOCK TELEGRAPH COMPANY,
by NORVIN GREEN, *President.*

THE HARMONIC TELEGRAPH COMPANY,
by JOHN I. DAVENPORT, *President.*

JOHN F. DILLON,
WAGER SWAYNE,
GEORGE S. HALE,
of Counsel.

STATE OF NEW YORK, }
SOUTHERN DISTRICT OF NEW YORK, } ss.

NORVIN GREEN, being duly sworn, on his oath says that he is the President of the Western Union Telegraph Company, one of the complainants in the foregoing bill of complaint; that he has heard said bill of complaint read, and that the statements therein contained are true, as he is informed and verily believes.

Sworn to before me, this 29th of September, 1883.

WM. J. HARDING,
Notary Public,
Kings County,
New York.

[SEAL]

Certificate filed in New York County.

CONTRACT OF NOVEMBER 10th, A. D. 1879.

THIS AGREEMENT, made this tenth day of November, 1879, by and between the WESTERN UNION TELEGRAPH COMPANY, for itself and for the GOLD AND STOCK TELEGRAPH COMPANY, AMERICAN SPEAKING TELEPHONE COMPANY, and HARMONIC TELEGRAPH COMPANY, which it represents, Party of the First Part, and the NATIONAL BELL TELEPHONE COMPANY, Party of the Second Part, WITNESSETH:

ARTICLE 1. (1) The party of the second part shall pay to the party of the first part, upon all telephones used in the United States, under any license from the party of the second part, express or implied, unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid in accordance with the provisions of this contract, from licenses or leases for speaking telephones (exclusive of call bells, batteries, wires, and other appliances, or services furnished or performed). The rentals or royalties upon which said royalty or bonus to be paid to the party of the first part is to be reckoned, shall, for that purpose, be ascertained, by deducting from the gross rental or royalty received or rated as hereinafter declared, the commissions and allowances herein provided for.

(2) The royalty or bonus to be paid on telephones made in the United States solely for export and not licensed for use in the United States, shall be twenty per cent. of the net profit actually derived by the party of the second part in their manufacture and sale above the cost of such manufacture, not including any part of the general expense of the party of the second part as part of such cost, and not including in the manufacturer's profit any enhancement of price fairly due to the fact that the party of the second part holds or in any way controls a monopoly of the use of such telephones in any foreign country other than Canada, if such case shall exist.

Provided, however, that where the party of the second part shall be in any way interested in the purchase or use of such telephones n such foreign country, it shall be at the option of the party of the first part to require an accounting for all telephones so exported as

if sold at a fixed profit of thirty-three and one third per cent. upon the cost of manufacture.

(3) Allowance shall be made for rentals or royalties which cannot be collected, and for usual and reasonable deadhead of free privileges.

ARTICLE 2. Concerning the sum which is to be taken as the gross rental or royalty for the purposes or the preceding article, it is declared and agreed:—

(1) The word "telephone," as used in this contract, refers to an instrument for electrically transmitting or receiving articulate speech, and is understood to mean either a transmitting instrument, incapable of use as a receiver, a receiving instrument incapable of use as a transmitter, or an instrument capable of being used both as a transmitter and receiver.

(2) Ten dollars per annum for each telephone where only one is used at a terminal or station, and fifteen dollars per annum for a pair of telephones composed of an instrument used for sending and another instrument used for receiving, used at one terminal or station, are recognized as the present standard rates of gross rentals or royalties; and the party of the second part may change them, subject to the qualifications of sections (4) and (5) of this article, but not otherwise.

(3) Telephones used on exchanges or lines owned in whole or part by the party of the second part, or by auxiliary corporations or organizations in which it is interested, or rented together with lines owned in whole or part by it, or by auxiliary corporations or organizations in which it is interested, shall be rated as paying to said second party the said recognized standard rates, or such other rates as may hereafter be established in accordance with this contract for like uses by parties other than the second party or auxiliary corporations or organizations in which it is interested, less the commissions and allowances provided for by this contract; but whenever the party of the second part is or shall be interested with others in the ownership of such exchanges or lines, the annual rental or royalty actually charged to and received from the owners thereof for the use of the telephones, if greater than the rates established as aforesaid, shall be taken to be the gross rental for the purpose of ascertaining the stipulated bonus or royalty.

(4) No reduction from the said present recognized standard rates which shall be made on telephones used on exchanges or lines owned in whole or in part by the party of the second part or by auxiliary corporations or organizations in which it is interested, or rented together with lines owned in whole or in part by it, or by auxiliary corporations or organizations in which it is interested, shall operate to reduce said royalty or bonus to be paid to the party of the first part below $1.00 per annum for each terminal single telephone, and $1.80 per annum for each terminal pair, unless such reduction be made with the consent of the first party, or as provided in the following section.

(5) Whereas it is difficult to determine absolutely and in advance the price which at all times and for all purposes it will be advantageous for the interests of the patents and of both the parties as interested in income derived from royalties and rentals, to charge, either with a view of increasing the revenue of the parties hereto from royalties and rentals by enlarging the demand for the instruments, or under circumstances of competition, it is agreed that the party of the second part, in cases where its power to reduce is qualified as hereinbefore expressed, may reduce the rentals either generally or for a particular purpose, or a particular locality, or a particular licensee or class of licensees, to such sum as may be advantageous as aforesaid for the interests of both parties and as may be determined by agreement of the parties hereto, or as provided in this article.

If the parties do not agree as to the propriety of such a reduction, or as to the amount, extent or manner thereof, then said second party may in writing notify the first party of its desire for a reduction, and shall specify in such notice the reduction it desires and the character thereof, and the reasons therefor, and request the other party to join with it in selecting and appointing three referees. If the parties hereto shall not jointly appoint three referees within seven days from the receipt of such notice, then the moving party may, within seven days after the expiration of said first period, name one referee and notify such appointment to the other party, and request it to appoint another referee within seven days after receipt of notice of such appointment. If said other party shall not appoint a second

referee within said period, then the moving party may give to the party in default written notice of the former application and notices, and that the time therein specified has expired, and that the moving party has not received information of the appointment of a referee by the other in accordance therewith, and inclosing copies of said former notice, and the party of the first part within one week after receipt of the last described communication, may in writing appoint a referee and notify such appointment to the other party, and thereupon the reference shall be proceeded with as herein provided; and the change specified in the notice first given as above shall be deemed agreed to, and shall *ipso facto* take effect and be established upon the expiration of the period last above referred to, unless the other party shall appoint a referee as aforesaid within said period. Said two referees shall jointly select and in writing appoint a third within ten days after the appointment of the said two. If said two do not select and appoint a third within the period above specified, then the moving party may apply to any judge of the United States Circuit or District Court in the cities of Boston, or New York, or Brooklyn, and request him to appoint said board of three referees. Said judge shall not be required to and shall not consider whether any occasion or right to such reduction exists, and he shall act summarily in appointing said three referees, having first given the parties reasonable opportunity to be heard on such notice as he shall think fit. If any judge applied to shall decline to act, then the moving party may apply to some other of the persons above designated. All the three referees, however appointed, shall be disinterested, and not officers nor in the employ of any of the parties named in this contract. An award in writing, made and signed by any two of them shall stand as the award of the Board. Unless the decision is made and notified to the parties within thirty days from the appointment of the three referees, the moving party may, at its option, treat the reference as void and inoperative, and a new appointment may be called for in the manner and with the effect herein specified. Said referees shall have power to determine whether occasion for a reduction exists for the reasons stated in the preamble of this section, and if so, then to determine how far, to what extent, and for how long the said limitation on the power of the second party to reduce the rentals shall be

removed or modified. After such removal or modification the said limitation, as modified, unless and until further changed as herein provided, shall stand and be in all respects in lieu of that hereinbefore declared. During six months after a decision so made, no new reference upon the same subject before submitted can be asked for; but during that period either party may apply to the same board of referees, and said board, if it shall find that a new state of facts, or new exigencies have arisen and require some change, may make such change in their award as they find occasion for as aforesaid, and such change shall stand and be operative from the time it is made and notified to the parties until further change be made by said board within said period, or by a new reference called for after said period, or by agreement of said parties. If during said period any arbitrator dies, refuses, or for any reason is unable to act, then the vacancy shall be filled by said parties jointly, if they agree, and failing to agree, then by the two remaining referees, and if they do not so appoint within ten days after a request in writing from either party so to do, then the vacancy may be filled by some judge, as hereinbefore provided.

Twenty per cent. of the expenses and compensation of the referees shall be paid by the party of the first part, and eighty per cent. by the party of the second part, unless the referees shall otherwise order. The notices herein required to be given may be given to the President or Secretary of the Western Union Telegraph Company or persons acting as such, and to the President, Secretary or Treasurer of the National Bell Telephone Company or of its successors, or persons acting as such officers.

It is however expressly agreed and further provided that the party of the first part, at any time after the receipt of actual notice of an actual reduction of rates in consequence of its default, as aforesaid, may in the manner above provided, on alleging and showing to party of the second part, and upon their failure to join in a reference, as aforesaid, then upon showing to any of the judges above referred to, that it did not receive and was not informed of the notices to appoint and the communication of such notice, above described, require and obtain, in the manner above provided, the appointment of a reference to consider any reduction thus fixed by

default, and the referees thus appointed may by award, in whole or in part, restore the former limitation on the power to reduce rates, which restoration shall take effect from the date of said award.

If, from any cause, a reference twice called for shall fail to produce a valid determination, as herein contemplated, upon the matter submitted, or to be submitted, than the party aggrieved may have such relief or protection in a court of law or equity in the premises by a specific performance or otherwise, as such court can afford.

(6) Telephones for speaking-tube purposes, that is, instruments to be used for speaking from one part of the licensee's premises or from one of his buildings to another analagous to the use of speaking tubes, or telephones to be used by institutions of learning for scientific purposes, or telephones for connecting persons and families for social or household purposes only, not connecting with any exchange or central office; and telephones which are not to be used in circuit with any exchange or central office, and are not rented together with lines owned by the party of the second part directly or indirectly or by any auxiliary organizations in which it is interested, may be put out either at lower rentals than the standard, or at a gross sum to be paid in one payment, according to the discretion of the party of the second part; and in respect of such telephones the royalty or bonus is to be twenty per cent. of the reduced rental or gross sum, less commissions actually paid as herein provided.

(7) The party of the second part may increase the established annual rate either generally or upon telephones used for any particular purpose, or by any particular class of licensees, from time to time at its discretion, and such higher rates, while in force, shall be taken to be the gross rentals or royalties in respect of the telephones for which they are obtained.

(8) The limitations or reductions herein contained shall not apply after the expiration of the patent of the United States No. 186,787, granted to Alexander Graham Bell, January 30, 1877, which patent will expire January 30, 1894, unless some other patents owned by the said party of the second part, or under which it has exclusive licenses, shall operate to control the use of all speaking telephones substantially as they are now controlled by the patents represented by the two parties hereto.

ARTICLE 3. (1) In ascertaining rentals on which the royalty or bonus is to be paid to the party of the first part, there shall be deducted from the gross rentals the following commissions and allowances:

On telephones used in district or exchange systems owned in whole or in part by the second party, or by auxiliary corporations or organizations in which it is interested, an allowance or commission of thirty per cent.

On telephones taken by the first party for private lines as hereinafter provided, or used by the second party on its own lines or put out by it, by its own officers or servants for any use other than on district or exchange systems in which it is interested as aforesaid, twenty-five per cent.; and the party of the first part or those it represents, shall be allowed said abatement of twenty-five per cent. from the standard rentals upon telephones leased to it or them, except where contracts heretofore entered into by said party of the second part oblige it to pay such rate, or a higher rate of commissions to its present licensees.

Upon all telephones other than the foregoing, such rate of commission as shall actually be paid, not to exceed forty per cent., except so far as existing contracts may call for higher rates.

ARTICLE 4. (1) The party of the first part shall bear and pay twenty per cent., and the party of the second part eighty per cent. of all reasonable legal expenses incurred in ascertaining, investigating and determining, and in prosecuting and defending rights which the party of the second part may have, claim, or wish to acquire, pertaining to telephones or the right to use telephones, or to inventions used in telephones, and concerning patent rights which it or others may claim respecting the same, including expenses in suits and in proceedings in the Patent Office relating to such rates or to the collection of rentals or royalties on telephones. Expenses, incurred in whole or in part in respect to inventions or improvements which are or may be used otherwise than in telephones, shall be apportioned, and such part thereof as may be justly chargeable to the telephone interest shall be borne by the parties hereto in the proportion above stated, and such part thereof as shall justly be chargeable to other interests shall be borne by the owners thereof.

(2) The party of the second part may, from time to time, acquire such inventions and improvements in telephones as it may deem advisable, and may introduce such of them as it sees fit into the construction of telephones put out to its licensees, and to reimburse itself for the cost thereof, may charge an additional price to its customers beyond the price then previously charged, but such an increase shall not operate to increase the royalty or bonus payable to the party of the first part hereunder until said second party shall have been so reimbursed, unless said first party shall elect and assent to bear and pay twenty per cent. of such cost. Or if the party of the second part shall deem it advisable not to raise the price as aforesaid, then the party of the first part shall bear, pay and be charged with twenty per cent. of said cost actually and in good faith incurred and paid, and the party of the second part shall bear, pay and be charged with eighty per cent. thereof. *Provided*, that if such payments are for rights which extend beyond the duration of this contract, or which are to be applied to purposes other than telephonic, then only a *pro rata* proportion, according to time or the purpose for which they are used, shall be borne by said first party. *And provided* further, that if the purchase of any one patent calls for an absolute payment exceeding $10,000, no portion of the excess over that sum shall be charged to the party of the first part, unless it shall consent (and full opportunity shall be afforded it to do so) or it be determined by the board contemplated in Article 2, or by some other competent tribunal, that it should be so charged in respect of such excess; and said board shall so determine if, or so far as they shall find that said purchase was prudently made for the benefit of the parties hereto. Said second party shall call for said reference, and the referees shall be appointed, and such proceedings shall be had in reference thereto as are provided in said Article 2, so far as they can apply; and the question submitted by the notice calling for said reference shall be determined by the default of the party or the decision of the referees, as therein provided; and the determination so arrived at shall be final and conclusive upon the questions so submitted.

ARTICLE 5. (1) The party of the first part, for itself and those

it represents, as aforesaid, hereby grants to the party of the second part, as far as they or either of them have the legal power so to do, an exclusive license during the full terms for which patents thereon have been or may be granted, to make, to use, and to license others to make and to use in speaking telephones, call bells, and switches, and other appliances for use on telephonic lines, any inventions or improvements therein which it, or those whom it represents, as aforesaid, now own or control, in whole or in part, by contract or otherwise, under which it or they have the authority to grant such license, and whether already patented or not, and which the party of the second part shall not otherwise have the right to use; reserving however to the party of the first part, and those it represents, the right to use said inventions in switches, call bells, and appliances other than telephones in connection with the telephones which they are or may become entitled to use under this contract. Instruments or apparatus made under this license shall be deemed to be licensed only for the uses above named and not for any other purpose.

(2) And the first party further agrees to acquire any further inventions adapted to be used in connection with telephones which it may have the right to so acquire under existing contracts with George M. Phelps and Thomas A. Edison, and to license the second party under the same for use in telephones or on telephone lines, the second party agreeing to pay to said first party in reimbursements whatever the said first party or those it represents may be required to pay therefor under the ninth, tenth, eleventh and thirteenth clauses of the agreement between Thomas A. Edison and the Western Union Telegraph Company, dated May 31st, 1878, and whatever it may be required to pay said Edison under the contract between the same parties, dated May 12th, 1879, and whatever it may be required to pay George M. Phelps in addition to his salary of $3,300 therein referred to, to acquire his inventions under the contract between him and the Western Union Telegraph Company, dated January 20, 1876, or a due and proportionate part thereof, in case said inventions shall also be applicable to uses and purposes other than telephonic, said licenses to be exclusive during the term of this contract, and to continue but not to be exclusive thereafter;

the character and extent of such license shall be taken into account in arriving at a fair proportion of the actual cost thereof.

(3) And if the parties of the first part shall hereafter acquire ownership or control as aforesaid of other inventions adapted to be used in connection with telephones, the second party shall have the right or license to use the same for telephonic purposes, and shall be bound to pay to the party of the first part the cost thereof, or a due and proportionate part of said cost. Such right or license shall be exclusive for telephonic purposes during the whole period of this contract, and shall continue, but shall not be exclusive after its expiration; the character and extent of such license shall be taken into account in arriving at a fair proportion of the actual cost thereof.

(4) Said second party will pay on instruments, which shall be made by or for it, the royalties specified in Schedule A, hereby referred to and made part of this agreement, so far as the first party or those it represents shall be bound to pay the same under the contracts therein referred to, unless it may have the right to make and use such instruments irrespective of this contract and of the contracts referred to in said schedule by reason of the invalidity of the patents therein referred to, or otherwise, in which cases it shall not be deemed to be acting under any license from the party of the first part or those it represents for any such royalties it or they may be legally bound to pay by reason of any use by the party of the second part.

(5) This contract shall operate as a release to the parties hereto, and those they represent, and their respective licensees and predecessors, for all claims for infringement of patents on which suits are now pending, in which said parties, or any of their licensees or predecessors are parties, and all claims for infringement of other patents or inventions owned or controlled by them, or either of them, growing out of, or based upon, the manufacture or use of telephones now used in territory to which this contract applies at once; but as to telephones in territory to which it does not apply at once, it is not to operate as such release (and each party stands on its own right in such conflicting territory) until settlements are made and interests harmonized as hereinafter provided, or until the parties hereto agree that it shall operate as a release upon telephones

in such localities, and in either of such cases it shall thereupon operate as a release in respect of telephones in such locality.

ARTICLE 6. Except as herein provided, the first party and the companies it represents agree to withdraw from the manufacture, rental and use of telephones.

ARTICLE 7. The party of the first part agrees to give assistance and coöperation in developing and extending the use of the telephones of the party of the second party and that the party of the second part shall, during the term of this contract, and when in the judgment of the first party it shall not interfere with the enjoyment and use of the same by said first party for telegraphic purposes, have permission to build lines under any franchises, contracts, licenses or rights of way enjoyed or controlled by the party of the first part, or to use any poles, fixtures, structures, or plant of said first party, upon reasonable terms, subject, however, to a revocation of such license to use any poles, structures, fixtures, or plant, at any time, by reasonable notice to the party of the second part.

ARTICLE 8. Whereas it is intended as a part of this agreement that all telephones heretofore put out under lease or under license by and from the party of the first part and those it represents shall, without any exception (except temporarily where this contract does not at once apply), become the property of and come under lease and license from the party of the second part, and, when so transferred and placed under lease and license in accordance with the terms hereof, shall not be pursued or treated as infringing instruments in respect of any use thereof prior to the date of this agreement;

And whereas it is also intended that all telephone exchanges which have heretofore been established by the party of the first part or those it represents, or by or under contracts with them or some of them, shall, together with their plant, be transferred to the party of the second part and become its property, and that all interests of the party of the first part or those it represents, whether as holders of stock or other interests in telephone exchanges or corporations or organizations owning or maintaining exchanges, shall be transferred to the party of the second part and become its property, except in the localities named in section (5) of this article;

And whereas the party of the second part or its predecessors, owners of the Bell patents, have heretofore granted certain licenses, and made certain contracts, exclusive in their character to a certain extent, which may render it impracticable or improper for it to so accept and license some of said telephones and exchanges without the consent of the grantees of such previous licenses who are not parties hereto, and whereas the party of the first part, or those it represents, may not be legally able to transfer some of said property or interests without the concurrence of third parties, so that certain of the transfers desired cannot be made or cannot be accepted and the intended licenses given until arrangements or modifications of contracts can be made with one or both the present licensees claiming conflicting rights (as may be necessary in each case), which will permit the transfers and licenses so intended and desired to be made and granted;

Now, therefore, it is agreed as follows:

(1) In the places named in Schedule B hereby referred to, and made part of this agreement, in which places it is understood that no such conflict exists, the exchanges and interests in exchanges owned by the party of the first part, or those it represents, and all the property connected with such exchanges, including contracts of the subscribers, and all telephones in said localities shall forthwith be transferred and delivered to and put under lease or license from the party of the second part and paid for by it as hereinafter provided, except that telephones which already belong to the party of the second part are not to be again paid for. All the interest owned by the Gold and Stock Telegraph Company in the American District Telegraph Company at Boston is to be included in the transfer provided for by this section.

(2) In the places named in Schedule C, hereby referred to and made part of this agreement, in which places it is understood that the party of the first part or those it represents are sole owners of all the exchanges established and all the telephones put out by or under it or them, but in which the party of the second part has granted licenses which may conflict as aforesaid, the party of the first part and those it represents, will transfer all such exchanges and telephones to the party of the second part, who will accept and

pay for said exchanges, and accept, pay for and license said telephones as herein provided, but the party of the second part shall not be required to take, pay for, and license the same as aforesaid, until opportunity has been afforded for the requisite arrangements to be made as aforesaid with its licensees, or it shall elect to accept, pay for, and license the same without waiting for such arrangements to be made.

(3) This contract shall not operate upon nor affect the telephones and exchanges in the places specified in Schedule D until arrangements have been made with owners or part owners of exchanges therein who are not parties hereto, or until the parties hereto shall agree that it shall operate therein. But the provisions of sections (8) and (9) of this article shall apply to such localities. Upon the transfer of said interests the parties hereto, and those represented by them, will use their best endeavors to cause all telephones in said localities, which have been manufactured or furnished by or on behalf of the first party, or those it represents to be transferred to and put under license from the party of the second part as aforesaid, and the same shall thereupon be accepted, paid for, and licensed by said party of the second part as herein provided.

(4) With regard to the price to be paid by the party of the second part to the party of the first part for instruments and all properties and interests to be transferred hereunder, it is agreed as follows: for the instruments specified in Schedule E, hereby referred to and made part thereof, there shall be paid the amounts therein specified respectively, or a proportional part thereof upon the delivery of a portion of said instruments less than the whole number specified, payment to be made upon delivery of the same as herein provided; and in renting such of said instruments as include a transmitter, call bell and switch, being the twenty-two kinds first named in said schedule, the party of the second part may charge a rent or price for the call bell and switch in addition to the standard rent of the telephone itself, and an amount of such additional rental not to exceed three dollars per annum for a period which shall yield an amount equal to nine dollars on each instrument shall be rated as applying to the call bell and switch in said instruments, and on this amount no royalty or bonus shall be paid to the

party of the first part. In addition to the sums specified in said schedule the party of the second part will pay the royalties of twenty or twenty-five cents a switch which have been paid on switches included in said schedule and made under contracts with T. B. Doolittle or H. L. Roosevelt. All exchanges which the party of the first part or those it represents have established and own, and all interests, entire or partial, which are to be transferred hereunder, acquired by them in other exchanges or in corporations owning exchanges, are to be paid for when transferred at the actual cost to the party of the first part or those it represents, at the time of transfer, of establishing or purchasing the same, not taking into account any profits or losses in operating the same nor legal expenses in patent suits. Exchanges and exchange plant (which are to be paid for at actual cost) include wires, lines, poles, fixtures and other appliances, and also all call-bells, batteries, switches and switch-boards which are in use or on hand fit for use, and are owned and paid for by the exchange, but where the telephone lines have been placed upon poles or fixtures erected for telegraph lines such poles and fixtures are not to be transferred, but the party of the second part may continue to use the same under and subject to the provisions of Article 7. In cases where the value, cost or price remains to be fixed or ascertained, if the same cannot be agreed upon by the parties hereto, it shall be appraised, fixed or determined by two disinterested experts, one to be chosen by each party; and if the two so chosen cannot agree they shall choose a third, and the decision of the majority shall be binding upon the parties.

(5) The undertaking of the party of the first part, and those it represents, to transfer all their interests in telephonic district or exchange systems, and corporations or organizations owning them, shall not be held to include the stock interests of said first party and those it represents in the "Philadelphia Local Telegraph Company", "The Central District and Printing Telegraph Company" of Pittsburgh, the "The Gold & Stock Telegraph Company of California", the "Michigan District Telegraph Company" of Michigan, which companies have some interests in telephonic exchanges; nor to include their interests in the properties (other than telephones) in the exchanges within thirty-three miles of New York City Hall. The

party of the first part and those it represents will, as soon as local conflicting interests can be harmonized, transfer to and put under lease and license from the party of the second part, upon its acceptance and payment for the same as herein provided, all telephones in said New York territory, and in the localities covered by the companies above mentioned, and will use their best endeavors to procure this to be done as soon as possible.

(6) As to all telephones heretofore put out by the party of the first part or those it represents, for uses for which it or they are entitled to be furnished with telephones as provided in Article 14, they shall transfer the title in the same to the party of the second party, and thereupon shall receive leases and licenses for the same in accordance with this contract, and the party of the second part shall pay for such telephones as herein provided. In all cases where the party of the first part or those it represents are to be licensees of telephones now out and the title in which under the provisions hereof is to be transferred forthwith, they shall begin to pay the rental and royalty thereon and licenses shall issue as from the day this agreement takes effect, and at the present recognized standard rate until some other shall be established in accordance with the provisions hereof. But any such telephone which cannot be so transferred, accepted and licensed, by reason of conflicting or inconsistent rights heretofore granted by the owners of the Bell patents to their licensees, shall not be paid for nor shall the rent or royalty thereon begin until such conflicting interests can be harmonized as herein provided so as to permit such transfer, unless said second party shall elect sooner to take, pay for and license the same; and until such transfer the provisions of this contract shall not apply to any telephone so situated, and the party of the first part and those it represents shall, in the meantime, stand as they would have done with reference thereto had this contract not been made.

(7) All telephones as to the transfers of which special provision has not been hereby made, are to be transferred to and paid for by the party of the second part, and by it licensed directly to customers and users forthwith in the manner and with the effect herein provided, or as soon as practicable as aforesaid.

(8) With respect to the telephones and the telephone exchanges

and properties and interests the transfers of which may be delayed by reason of conflicting claims or interests as hereinbefore provided, it is agreed that both parties will use their best endeavors and due diligence to arrange with their respective licensees and associates such modifications of existing obligations as will allow said transfer to be made at the earliest possible date. Until such time the parties of the first part will not transfer any of said properties (except so far as existing contracts may legally require them) to any person or party, unless approved by the party of the second part.

(9) And the party of the first part, for itself and those it reprerents, agrees that previous thereto any of said exchange properties shall be transferred at said cost price, on request, to any party approved by the party of the second part who shall not be a competitor in the telegraph business with the Western Union Telegraph Company, suitable provisions first being made to protect from oppression the rights and interests of local and associate owners of the exchanges and exchange plant.

(10) And said first party also agrees that suitable accounts, statements and information shall be seasonably furnished to the party of the second part, for the purpose of, or to assist in ascertaining the price to be paid for all properties and instruments which the party of the second part is to or may take and pay for under this contract.

(11) Telephones which have been sold by the party of the first part, or those it represents to institutions of learning and to the Government of the United States, shall be deemed to be licensed by the party of the second part, and shall not be made the basis of any claim for infringement.

ARTICLE 9. As to each locality named in Schedules C and D in which the transfer of the exchanges and telephones may be delayed, as provided in sections (2) and (3) of Article 8, and as to each locality mentioned in section (5) of said article in which the transfer of telephones may be delayed as provided in said article, and as to all telephones (not used on exchanges) in localities where the acceptance of telephones is delayed, as provided in (6) and (7) of said article it is agreed, so far as the conflicting class may extend, that, until the time shall arrive for the transfer for such locality to be

made as in said sections is provided, the parties hereto respectively, and the owners or users of telephones or telephonic appliances claiming or holding under persons whose claims create the conflict and give rise to the delay shall not have the benefit of any immunity or protection from suits by reason of this agreement, or anything done hereunder or in consequence hereof, unless and until the parties hereto shall otherwise determine by a writing hereafter to be made; and nothing herein contained shall operate directly or indirectly, expressly or impliedly, as a license to any such person or party to use telephones or telephonic appliances within such locality, nor shall it in any way interfere with or affect the obligations which the parties to this agreement may be under respectively to their said licensees or with any rights of the first party to supply telephones in such conflicting territories as provided in Article 11. No royalty or bonus shall be paid in respect of telephones used within such localities and not entitled to the protection hereof, unless actually accepted and licensed as provided in Article 10.

ARTICLE 10. (1) All telephones and apparatus which are to be taken, paid for and licensed by the second party hereunder shall be placed under written leases and licenses from it, in such form and at such rentals as said second party shall establish under the provisions of this contract, not different from those at the same time established for other telephones used for like purposes; and the transfer shall not be deemed to be complete nor shall the second party be required to accept, pay for, or license any instrument until it shall be pointed out, ear-marked, and such delivery made of it as the nature of the case will permit. No telephone shall be deemed to be accepted and licensed under the patents of the party of the second part, nor shall any person be entitled to any immunity whatsoever from claims for infringement of any patent by reason of the manufacture or use of such telephone, nor shall it be required to be paid for by the party of the second part until it shall be so delivered and put under written lease or license hereafter to be made, or delivered into the actual possession of the party of the second part, or shall be designated, ear-marked and offered to be put under such lease and license by the parties entitled so to do, including the party in actual possession and the party undertaking and bound to pay rental and royalty therefor.

When any telephone shall be so accepted, leased and licensed, or shall be so offered within three months from the date hereof, and under the provisions of this contract, be required to be accepted and paid for, its manufacture and use, prior to such time, shall not be made the basis of any claim for infringement of any patent.

(2) But the second party may, at any time it sees fit, after the expiration of six months from the date hereof, take from the party of the first part or those it represents any existing telephone (except those which the party of the first part or those it represents are entitled to have and use under the provisions of Article 14, and those which under Article 9 are temporarily excepted from the effect of this contract), with the existing license or contract for license for the same with all the rights of the owner or licensor, by a written notice to that effect given to the party in actual possession of the telephone, and also to the party of the first part, and thereupon it shall be entitled to receive the rental and royalty therefor, and be bound to take and pay for the same as herein provided; in such cases the bonus or royalty to be paid to the party of the first part under Article 1, during the continuance of such existing lease and license, shall be 20 per cent. of the rental actually received under the terms thereof; and in respect of all rights and interests transferred as provided in this article, said second party may, so far as necessary, but at its own expense, use the name of the first party or those it represents, to maintain and enforce all the rights and interest legally or equitably coming to it upon or by such transfer.

(3) The rental of the telephones transferred or required to be transferred to the party of the second part hereunder shall, from the time such transfers shall be or ought to be made, accrue to and be collected by said second party, subject to the payment and allowance of the royalty, bonus, and commissions hereinbefore provided; when all such transfers have been made, and the conflicting interests of the respective licensees shall have been so far harmonizsd as to enable said first party to cease to manufacture and supply telephones as provided in Article 11, then said second party will receive and pay for all the remaining property belonging to said Gold and Stock Telegraph Company and American Speaking Telephone Company, of the character specified in Schedule E, at the prices therein stated.

All telephones made for use after Nov. 1, 1879, are to be paid for at actual cost when transferred.

ARTICLE 11. (1) The first party reserves all such rights as it now possesses to continue to manufacture and supply its own telephones, notwithstanding the stipulations of this contract, to its own exchanges already established and in actual operation and subscribers thereto, and to its licensees, until the local conflicting interests between the respective licensees of the two parties hereto can be harmonized; and until any property of said first party at such places shall be turned over to said second party and paid for, as hereinbefore provided; but said first party shall organize no new exchanges, nor grant any new or additional licenses (except to additional subscribers to exchanges already established) creating new or additional conflicts or complications except within the radius of thirty-three miles from New York City Hall, and within the territory covered by the Ormes contract hereinafter referred to; and such places where such conflicting interests of licensees exist shall, until they can be so harmonized, be exempt from the operation of this contract as aforesaid.

(2) But it is distinctly understood as an essential feature of this contract that all the telephone district or exchange systems except those within the radius of thirty-three miles from New York City Hall, and within the territory covered by said Ormes contract, are to be transferred to and accepted by the party of the second part at the earliest possible day, and that their continuance in the hands of the party of the first part during the meantime, is merely to give an opportunity for local interests to become harmonized, and to avoid inconvenience to the public, and not as a source of revenue or advantage to the party of the first part or those it represents.

ARTICLE 12. (1) The right to all uses of the telephone on wires of a district or exchange system is to remain exclusively with the party of the second part, excepting such temporary suspension of the application of this contract to certain localities, as has been already herein provided for.

(2) For the purpose of this contract it is agreed that an "exchange" or "a district or exchange system" applies to a system in which different stations on the same or different circuits, and either

within any city or town, or within a radius of fifteen miles of a central office (or within wider limits, where existing contracts have granted wider limits), are connected with such central office or branch offices within said territory for the purpose of placing subscribers or other parties by such circuits in communication with such central or branch offices, or with each other, either directly or through the agents of the system.

ARTICLE 13. (1) The right to connect telephonic district or exchange systems for the purpose of personal conversation between persons at the instruments, and the right to use telephones on all lines not forming a part of a telephonic district or exchange system for such personal conversation (except so far as licenses for private lines are to be granted to the party of the first part under Article 14), are to remain exclusively with the party of the second part, and those licensed by it for the purpose.

But such connecting and other lines are not to be used for the transmission of general business messages, market quotations, or news for sale or publication in competition will the business of the Western Union Telegraph Company, or with that of the Gold and Stock Telegraph Company. And the party of the second part, so far as it lawfully and properly can prevent it, with not permit the transmission of such general business messages, market quotations or news for sale or publication over lines owned by it, or by corporations in which it owns a controlling interest, nor license the use of its telephones or patents or the transmission of such general business messages, market quotations or news for sale or publication in competition with such telegraph business of the Western Union Telegraph Company or that of the Gold and Stock Telegraph Company.

(2) The terms "general business messages" and "telegraph messages", or "messages for hire", are defined to mean all communications in behalf of other parties than those who directly communicate by the telephone by themselves or their servants or agents personally present at the instrument; and no person engaged in the business of transmitting messages for other parties shall be authorized or knowingly allowed by the party of the second part, or its servants or agents, to transmit such messages through the telephone.

(3) It is, however, understood that the stipulations of this contract relating to the transmission of telegraph messages shall not operate to restrain the renting of telephones by the party of the second part to railroad companies for strictly railroad messages, or for general business messages in connection with the Western Union Telegraph Company or its auxiliary corporations or organizations, nor so as to restrain, impair or affect the right of the party of the second part to use telephones by themselves or their licensees for all purposes in territory not occupied or covered by the Western Union Telegraph Company or its auxiliary corporations or organizations, nor for contracting with the Northwestern Telegraph Company and other companies as to territory not occupied or covered by the Western Union Telegraph Company or its auxiliary corporations or orzanizations at the time such contracts or licenses are made, or with the Government for lines in the Territories, or for Government lines for Government messages in the States. For the purposes of this contract the Western Union Telegraph Company is deemed to occupy and cover all the thirty-eight States of the United States, the District of Columbia and the Territories of Washington and Utah, except the Territory of the Montreal Telegraph Company, to wit, that part of the State of New York which is west of Lake Champlain and north of a line drawn from Whitehall to Oswego, and except the Territory of the Northwestern Telegraph Company, the State of Wisconsin (except the line between Chicago and Milwaukee), the State of Minnesota, that part of Iowa which is north of Sioux City, and the upper peninsula of Michigan, and except all that part of Florida which is not reached by the lines of the International Ocean Telegraph Company, or of the Western Union Telegraph Company.

(4) The party of the second part will not knowingly grant any license to use telephones for any purpose for which it agrees not to use them as specified in this article, and it will insert in all its licenses, such apt and suitable restrictions as under the advice of counsel are deemed reasonable and proper to that end, and upon notices of any breach thereof will use all reasonable means to enforce the performance and observance of the same. But it is understood that the party of the second part is not to be held responsible for

any breach of the stipulations of this Article and Article 15 of this contract not committed by the officers or servants unless it had reasonable notice and failed to use reasonable means to prevent it.

(5) The whole expenses of litigation, if any shall arise with third parties in consequence of the stipulations of this article relating to the transmission of general business messages, market quotations or news for sale or publication, or acts in pursuance thereof, or attempts to enforce the same, shall be borne by said Western Union Telegraph Company. Said last-named company shall also have control of all such of said suits as do not bring in question the validity, construction, or effect of, or title to, the patent rights of the party of the second part, or any of them, whether held by ownership or license, and for that purpose it shall be the duty of said second party to give due authority to such counsel and such attorneys in law or in fact, as the Western Union Telegraph Company may nominate to institute, appear in and conduct such suits, in the name of the second party if necessary.

ARTICLE 14. (1) The party of the second part will fully license the party of the first part to use telephones procured from it for transmitting telegraph messages, and for use on private lines, with the right to sublet the use thereof along with such private lines, for such purposes as such private lines have been and are being used, except in territories where exclusive agency contracts inconsistent with this agreement to license already exist, and during the continuance of such agencies, in which case they may obtain them from such agents.

(2) For the purposes and uses aforesaid, the party of the first part shall be furnished with telephones, with licenses from the party of the second part to use such telephones and other inventions owned or controlled by it for use in connection with telephone lines, on terms which may be established from time to time, and which shall be as favorable as those on which they are furnished to any other parties for like uses, and shall be allowed a discount as provided in Article 2.

(3) The party of the second part shall have the right from time to time to incorporate in its leases and licenses such apt and suitable stipulations as it may deem requisite for the control, preservation,

and protection of its telephones in the hands of licensees, to secure the payment of royalties and rentals, to protect itself against the application and use of telephones for uses different from those for which they are rented or licensed, and to aid it in protecting the patents owned by it or under which it has licenses, and its title thereto, from infringement or attack, and it may prescribe and require the party of the first part to incorporate such stipulations into all licenses, leases and sub-leases of telephones, granted by it: but no stipulations shall be incorporated in the licenses and leases to the party of the first part or prescribed as aforesaid, for the licenses and leases to be granted by it, different from those in use for other licenses for like purposes.

(4) For the purpose of this contract "private lines" are understood to refer to telephone lines, each consisting of a single circuit on which telephones are to be used for the individual and private business of the individuals, business firms or corporations leasing the same. Such telephones are not to be used by any other parties than those leasing them, except on business of the parties so leasing, nor is any business to be transacted by or through them, for a consideration or toll to be paid by other persons than those so leasing them. Such private lines or circuits shall not extend more than twenty-five miles beyond the municipal limits of the city or town in which one end of the line is situated, nor shall any one line or circuit be used for more than two individuals, firms or corporations at each end, nor shall any two or more lines or circuits be connected.

ARTICLE 15. (1) The second party will turn over and deliver to the Western Union Telegraph Company of the first part, or its agents, exclusively, all messages for transmission to other points by telegraph, collected by or coming on the wires or within the control of its telephonic exchanges or district systems or those of its licensees, wherever the first party has wires and is prepared to receive or transmit the same, so far as said second party can lawfully control the same, and unless otherwise specially directed by its customer; but will not solicit such special direction nor receive and pay tolls for transmission over other lines, unless compellable by law so to do. And the first party shall forward the same to destination, subject to its established rules and regulations, upon payment of regular tolls,

and pay to said second party a commission of fifteen per cent. on all the tolls received for transmitting such messages over its lines: the commission not to include tolls for the transmission over other lines, nor tolls for transmitting cable messages. For delivery service of telegraphic messages made through said second party or its licensees and for collecting through a messenger service for delivery to said telegraph company, the party of the first part will pay a fair compensation, the same that is paid to district telegraph companies for similar services.

(2) If the second party, for the purpose of doing a general telegraph or telephone business, shall connect a telegraph station of the Western Union Telegraph Company by a branch line with any place in territory occupied or covered by the Western Union Telegraph Company which has no Western Union line or office, it shall turn over and deliver to the Western Union Telegraph Company, exclusively, so far as it has legal power to control the same (unless it be specially directed by the customer sending the same that they be forwarded by some other route), all messages collected from such points so connected. And said Western Union Telegraph Company will, as hereinafter provided, receive and forward the same upon payment of regular tolls, and pay to the second party or its agents a commission of ten per cent. upon the tolls received for transmitting such messages over the Western Union Telegraph lines (cable messages excepted from such commission); and there shall be added to the rate of tolls to be collected from customers a further rate, not to exceed ten cents per message of ten words on such branch lines of the length of ten miles or less, and five cents additional per message of ten words on each additional ten miles or fraction thereof in length of said branch lines, and at the same rate for longer messages; such tolls so added shall belong to the party of the second part.

(3) When the second party shall have constructed such branch lines to such new points within the territory occupied or covered by the Western Union Telegraph Company, but not theretofore reached by its telegraph lines, and the telegraph company of the first part shall thereafter elect to construct its lines of telegraph to such new

points, it shall, if required by said second party, take and pay for the lines of the second party at cost, and also pay said second party the commission provided in section (2) of this article on all the business taken at such point for the period of twelve months thereafter. But if the party of the second part shall elect to keep its own lines the provisions contained in Article 13 against the transmission of general business and other messages shall apply to such line.

(4) Where any messages are to be delivered between the parties through the telephone, said party of the first part is to afford to the party of the second part, at the expense of the second party, the facilities for providing a telephone connection between its office and the office of the district exchange or branch line, and shall at its own office, without further cost to the party of the second part or its licensees, receive or transmit said messages over said connecting line by its own clerks, who for that purpose shall be the agents of the second party and subject it to its rules and regulations.

(5) It is also agreed by the party of the first part, for itself and those it represents, that it will not connect its telegraph lines with any telephonic district or exchange system other than those licensed by the party of the second part, so far as it lawfully can refrain from so doing, except in districts and during the time temporarily excepted from the operation of this contract.

(6) All messages or communications of customers delivered by either of the parties to the other for further transmission over its telegraph or telephone lines, as the case may be, shall be deemed to have been delivered and received subject to such established rules, regulations and conditions of the receiving company as may have been established and promulgated by it for the government of its business and not otherwise; and for the purpose of regulating and limiting the responsibility of the party receiving from the other a message or communication in this manner, it shall be the duty of the company receiving the message directly from the customer to require his assent to such rules, regulations and conditions of the other company by writing his message or communication upon the regular contract blanks of such company, or blanks containing an equivalent contract, or in such other manner as may be generally

required by such company for that purpose from its direct customers; and if either company, dealing with the customer in the first instance, shall fail in the duty last above stipulated, it shall hold the other company harmless from all claims for damage which it may be compelled to pay to the customer because of the absence of a contract arrangement with such customer subjecting the business in question to such established rules, regulations and conditions of the company thus rendered liable to the customer; the object of this stipulation being to limit the responsibility of each party to matters happening upon its own lines, and to secure the regulation of that responsibility in respect to all business originating beyond its own lines, in the same manner as such responsibility shall be regulated in respect to business beginning, continuing and terminating upon its own lines. Whenever any such rules, regulations or conditions shall be established or modified by either party the same shall be notified to the other party.

ARTICLE 16. The existing suits and interferences shall be disposed of as counsel of the parties of the first and second part may advise, to recognize and protect the rights of the several inventors to their respective inventions, subject to the orders of the courts and the decisions of the Patent Office.

ARTICLE 17. This contract shall go into effect as of the first day of November, 1879, and shall be and remain in force until the expiration of seventeen years thereafter. It shall cover the whole territory of the United States, except that included in the Ormes contract (which territory shall be included in this contract upon the expiration of said Ormes contract), and those conflicting localities hereinbefore referred to and temporarily excepted, and shall cover them as soon as those exceptions expire. Said Ormes contract is a contract dated August 26, 1879, to which James M. Ormes, the Western Union Telegraph Company acting for the same parties as in this contract, and the National Bell Telephone Company are parties; the territory covered by it is as follows: West Virginia south of the Baltimore and Ohio Railroad, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama. For the further contents of said contract, so far as is material, reference thereto is hereby made.

ARTICLE 18. (1) The party of the second part shall keep in regular books for that purpose, accounts of the number of telephones manufactured, licensed, and put out for use in the United States, and also of the rentals received and commissions or allowances paid or allowed as herein provided, and of the number manufactured and sold in foreign countries and the amount received therefor. And said accounts shall, at regular quarterly intervals and at all reasonable times, be open to inspection by the party of the first part, for the purpose of ascertaining the royalties or bonus due hereunder and of verifying the accounts rendered, and copies of said accounts shall be rendered at the time of the quarterly accounting. Tolls collected by the one party for the other, and commissions on telegraph business, shall be paid monthly at the place where business is exchanged. All accounts for royalties, and all other unsettled accounts shall be settled, and the balance paid on the first day of February, May, August and November, up to the first day of the preceding month. All such accounts shall be verified by oath of the persons having the best knowledge of the facts. Payments of the balances resulting from such accounts shall be made to the treasurer of the Gold and Stock Telegraph Company as representative of the party of the first part, or the treasurer of the second party, as the case may be, or such other persons in Boston or New York as the respective parties may from time to time appoint. Such persons shall have authority to settle all said accounts, and to receipt for the money.

(2) The party of the first part or its said representative is to be promptly notified of all reduction of rentals.

ARTICLE 19. It is understood and agreed that nothing herein contained shall be construed as imposing upon either party any obligation to do or not to do at any time anything contrary to law; and if anything herein covenanted or contemplated to be done or not to be done shall be or become contrary to the law of the land, the consequent inability and failure to perform the same shall not operate as a dissolution of this contract, nor to give to either party a right of action against the other.

ARTICLE 20. All the provisions and stipulations herein contained

and described as incumbent on or for the benefit of the parties hereto, shall be incumbent on or for the benefit of their respective successors or assigns.

In witness whereof said Western Union Telegraph Company hath caused these presents to be subscribed by its President, and its corporate seal to be hereto affixed by its Secretary, and said National Bell Telephone Company hath caused its corporate seal to be hereto affixed by its Clerk and these presents to be subscribed by its President and Treasurer on the day first above written.

THE WESTERN UNION TELEGRAPH COMPANY,
by NORVIN GREEN,
Pres't.

Seal Western Union Tel. Co.

Attest:
A. R. BREWER,
Sec'y.

THE NATIONAL BELL TELEPHONE COMPANY,
by W. H. FORBES,
Pres't.
GEO. L. BRADLEY,
Treas.

Seal National Bell Telephone Co.

Attest:
CHAS. EUSTIS HUBBARD,
Clerk.

The above-named Gold and Stock Telegraph Company, American Speaking Telephone Company, and Harmonic Telegraph Company, hereby acknowledge the authority of the Western Union Telegraph Company to represent and act for them in the matters embraced in the foregoing contact, and agree to be bound by and to carry out its provisions, it being understood and agreed by and between said named parties that the royalty and bonus upon telephones, herein provided to be paid to the said Western Union Telegraph Company, shall be paid to the said Gold and Stock Telegraph Company for the use and benefit of said American Speaking Telephone Company.

IN WITNESS WHEREOF said parties have severally caused these presents to be subscribed by their respective Presidents, and their

corporate seals to be hereto affixed by their respective Secretaries on he day of the date of said contract.

THE GOLD AND STOCK TELEGRAPH COMPANY,
by GEORGE B. PRESCOTT,
Vice-President.

Seal Gold & Stock Tel. Co.

Attest:
J. D. REID,
Sec.

THE HARMONIC TELEGRAPH COMPANY,
by E. W. ANDREWS,
President.

Seal Harmonic Telegraph Co.

Attest:
H. H. DUNCKLEE,
Sec'y.

THE AMERICAN SPEAKING TELEPHONE COMPANY,
by NORVIN GREEN,
Vice-Pres't.

Seal American Speaking Telephone Co.

Attest:
J. D. REID,
Sec.

SCHEDULE A.

The royalties which are referred to in (4) of Article 5 are:

A royalty of twenty cents per switch under a contract between the Western Union Telegraph Company and Thomas B. Doolittle, dated June 14, 1879, relating to said Doolittle's patent No. 209,115, granted October 22, 1878. The Western Union and Gold and Stock Telegraph Companies have, under said contract with Mr. Doolittle, made and paid him royalty on upwards of 5,000 of these switches.

A royalty of twenty-five cents upon each telephone embodying any of the inventions or improvements covered by the patent No 218,-582, granted to Sidney H. Short, August 12, 1879, under contract between the Gold and Stock Telegraph Company and said Short, dated August 22, 1879.

A royalty of twenty-five cents on each automatic switch which shall be made or used by the party of the second part, under H. L.

Roosevelt's patent, No. 215,837, of May 27, 1879, by virtue of the license contained in Mr. Roosevelt's letter to Mr. George P. Prescott, dated June 21, 1879.

The party of the second part does not hereby admit the validlty, effect, or value of any of said patents.

SCHEDULE B.

Places where the Western Union Telegraph Company or the Gold and Stock Telegraph Company have established exchanges or leased telephones, and the owners of the Bell patents have granted no exclusive rights to other parties, or where the Western Union Telegraph Company or Gold and Stock Telegraph Company have bought the Bell licenses, or interest therein.

No hostile interests are here to be reconciled, and the transfers may take place at once.

1. Places where exchanges were established and are owned by the Western Union Telegraph Company, and on which the telephones of the American Speaking Telephone Company are used:

Atchison, Kan.
Akron, N. Y.
Auburn, N. Y.
Boston, Mass.
Chester, Pa.
Concord, N. H.
Danville, Ill.
Decatur, Ill.
Davenport, Iowa.
Defiance, Ohio.
Evansville, Ind.
Galveston, Tex.
New London, Conn.
Houston, Texas.
Kansas City.
Independence, Mo.
Lafayette, Ind.
Leavenworth, Kan.

Little Rock, Ark.
Moline, Ill.
Meriden, Conn.
Pekin, Ill.
Pittsfield, Mass.
Portland, Me.
Providence, R. I. }
Pawtucket, R. I. }
Rock Island, Ill.
Richmond, Ind.
Rutland, Vt.
S. Norwalk, Conn.
Springfield, Ill.
Stamford, Conn.
St. Louis, Mo.
Topeka, Kan.
Washington, D. C.

2. Places where the Western Union Telegraph Company has acquired a part or the whole of the interest of the Bell licensees:

Bridgeport, Conn., the whole.
Columbus, Ohio, "
St. Louis, Mo., majority interest.
Providence, R. I. } "
Pawtucket, R. I. }

The Gold and Stock Telegraph Company own the telephone exchange in Boston. The stock owned by the Gold and Stock Telegraph Company in the American District Telegraph Company, of Boston, is to be transferred with the Boston Exchange.

SCHEDULE C.

Places where the Western Union Telegraph Company, or the Gold and Stock Telegraph Company have established and own exchanges, or have leased telephones, and where the owners of the Bell patents have granted rights to other parties under which those other parties might object to the use of the telephones put out by the Western

Union Telegraph Company, or the Gold and Stock Telegraph Company. In these cases, the Western Union Telegraph Company, or the Gold and Stock Telegraph Company could transfer at once, but the interests or obligations of the National Bell Telephone Company require that it shall have an opportunity to arrange with those licensees.

Bloomington, Ill.
Dayton, Ohio.
Fort Wayne.
Syracuse, N. Y.
Fayetteville, N. Y.
Fall River, Mass.
Hartford, Conn.
Indianapolis, Ind.
Keokuk, Iowa.
Lockport, N. Y.
Manchester, N. H.
New Haven, Conn.
Niagara Falls, N. Y.
Norwich, Conn.
Peoria, Ill.
Rochester, N. Y.
St. Joseph, Mo.
Tonawanda, N. Y.
Trenton, N. J.
Cincinnati, Ohio.

SCHEDULE D.

Places where exchanges have been established, and have used telephones furnished by the Gold and Stock Telegraph Company.

(1) Exchanges in which the Western Union Telegraph Company owns a stock interest:

Albany and Troy Territory, N. Y.
Newburgh, N. Y.
Worcester, Mass.
Springfield and Holyoke, Mass.

Cleveland, Ohio.
Erie, Pa. (American District Co.)
Louisville, Ky. (contract made but no instruments furnished).
Denver, Colorado.
Central City, "
Black Hawk, "
Golden, "
Georgetown, "
Leadville, "

(2) Exchanges established and using telephones furnished by the Gold and Stock Telegraph Company, but in which neither the Western Union Telegraph Company nor the Gold and Stock Telegraph Company have any interest.

Buffalo and Williamsville, N. Y.
Chicago, Ill.
Dubuque, Iowa.
Des Moines, "
Milwaukee, Wis.
Toledo, Ohio.
Lawrence, Mass.
Quincy, Ill.
Utica and Suburbs, N. Y.
Poughkeepsie, "
Camden, N. J.
Wilmington, Del.

Memo. The owners of the Bell patents have granted licenses, or made agency contracts for the Albany and Troy district, Worcester, Springfield and Holyoke, Cleveland, the six towns in Colorado, Buffalo and Williamsville, Detroit, Milwaukee.

SCHEDULE E.

No. 26. PHELPS' BATTERY-EDISON SET. For private wires, on desk case, with jointed arm transmitter and bell call; has fork for one hand or crown telephone, with automatic switch. Calls worked by battery.

Number of instruments, 707: Price $5,588 67

No. 2. BERGMANN'S BATTERY-EDISON SET. For private wires, in square box, with stationary bevel transmitter and bell call. Has forks for two hand or crown telephones; switches all automatic, except lightning cut-off. Calls work by battery.
Number of instruments, 100: Price $787 50

No 25. PHELPS' BATTERY-EDISON SET. For private wires, on desk case, with jointed arm transmitter and sounder call. Has fork for one hand or crown telephone, with automatic switch; calls worked by battery. (No more of this style made now.)
Number of instruments, 469: Price $4,834 13

No. 31. PHELPS' BATTERY-EDISON SET. For private wires, on desk case, with jointed arm transmitter and repeating sounder. Same as style No. 25, except that the sounder has repeating points for extra local and bell. (No more of this style made now.)
Number of instruments, 48: Price $522 00

No. 33. PHELPS' BATTERY-EDISON SET. For exchange customers, on desk case, jointed arm transmitter and bell call. Has fork for one hand or crown telephone. Hand switch to turn when using telephones. Bell magnets, 10 ohms, worked by calling battery at Central Office.
Number of instruments, 110: Price $1,023 75

No. 34. BERGMANN'S BATTERY-EDISON SET. For exchange customers, in square box, stationary bevel transmitter and bell call. Has forks for two hand or crown telephones; has no switches to turn; all are automatic. Bell magnets, 10 ohms, worked by calling battery at Central Office.
Number of instruments, 1,027: Price $7,325 25

No. 29. PHELPS' LONG-LINE MAGNETO-EDISON SET. In octagon case, jointed arm transmitter. Has magneto calling apparatus.
Number of instruments, 76: Price $1,061 85

No. 21. PHELPS' LONG-LINE MAGNETO-EDISON SET. In square box, with stationary bevel transmitter and forks for two hand telephones. Magneto calling apparatus.
Number of instruments, 100: Price $1,350 00

No. 27. PHELPS' SHORT-LINE MAGNETO-EDISON SET. In octagon case, with jointed arm transmitter. Magneto calling apparatus.

Number of instruments, 202: Price $2,423 25

No. 16. PHELPS' SHORT-LINE MAGNETO-EDISON SET. In octagon case, with box telephone inside and hand transmitter on cord. No hand telephone is used with this set, the box telephone being used as a receiver.

Number of instruments, 326: Price $5,623 50

No. 23. UNIVERSAL DESK SET. Latest style, with call bell and switch.

Number of instruments, 6,238: Price $42,248 03

CHICAGO EDISON BOX SET. Call bell and switch.

Number of instruments, 760: Price $7,095 00

No. 20. PHELPS' SHORT-LINE MAGNETO-EDISON SET. In square box, with stationary bevel transmitter and forks for two hand telephones. Magneto call.

Number of instruments, 500: Price $5,437 50

No. 3. PHELPS' LONG-LINE MAGNETO COMBINATION SET. In octagon case, box telephone inside and fork for one hand or crown telephone. Magneto call.

Number of instruments, 502: Price $7,516 50

No. 6. PHELPS' SHORT-LINE MAGNETO COMBINATION SET. In octagon case, box telephone inside and fork for one hand or crown telephone. Same as No. 3. Magneto call.

Number of instruments, 172: Price $1,999 50

CHICAGO EDISON BOX SET FOR EXCHANGE CUSTOMER. Call bell, switch and transmitter.

Number of instruments, 2,100: Price $14,006 25

CHICAGO EDISON BOX SET FOR P. L. Sounder call, switch and transmitter.

Number of instruments, 780: Price $7,835 63

CHICAGO EDISON BOX SET FOR P. L. Relay, bell, switch and transmitter.

Number of instruments, 603: Price $6,202 69

BOSTON EXCHANGE SETS. Same as style No. 33, with slight difference in connection.

Number of instruments, 100: Price $675 13

CALIFORNIA MAGNETIC HAND TELEPHONE.

Number of instruments, 913: Price $2,783 40

CALIFORNIA EDISON DESK SETS, with bell call.

Number of instruments, 802: Price $7,518 75

CALIFORNIA EDISON RELAY SETS. Same as Chicago relay sets.

Number of instruments, 27: Price $415 23

No. 14. PHELPS' BATTERY-EDISON SET. For Morse wires, on desk case, without call, with jointed arm transmitter and automatic loop switch. To be used where a Morse set or other means of calling are available.

Number of instruments, 596: Price $3,310 50

CALIFORNIA EDISON DESK SET. Without call.

Number of instruments, 76: Price $484 50

No. 28. PHELPS' BATTERY-EDISON SET. For central offices, on desk set; with jointed arm transmitter, and without switch or call. No arresters. To be used in central office for switching into branch lines, to listen for messages. Has fork for one hand or crown telephone.

Number of instruments, 4,201: Price $18,737 40

No. 12. BERGMANN'S BATTERY-EDISON SET. For central offices, in square box, with stationary bevel transmitter and without call. For same purpose as No. 28, but has forks for two hand or crown telephones.

Number of instruments, 164: Price $828 00

No. 18. PHELPS' NEW MAGNETO CALL BOX.

Number of instruments, 17: Price $102 00

No. 10. PHELPS' LONG-LINE MAGNETO CALL BOX. In octagon case, automatic switch and forks for two hand telephones.

Number of instruments, 396: Price $5,401 88

No. 11. PHELPS' LONG-LINE MAGNETO CALL BOX. In octagon case, hand switch and forks for two hand telephones.

Number of instruments, 446: Price $4,683 00

No. 9. PHELPS' LONG-LINE MAGNETO CALL BOX.

In square case, with double bells and fork for one telephone with automatic switch. An old style of box which is now obsolete.

Number of instruments, 177: Price $2,335 13

No. 7. PHELPS' SHORT-LINE MAGNETO CALL BOX. In octagon case, with plug switches and forks for two telephones.
Number of instruments, 279: Price $2,092 50

No. 8. PHELPS' OLD-STYLE MAGNETO CALL BOX.
In square case, with single bell. An old style now obsolete.
Number of instruments, 29: Price $380 63

No. 1. PHELPS' DUPLEX TELEPHONE. A hand magneto telephone, to attach to the various sets.
Number of instruments, 3,201: Price $9,912 60

No. 4. PHELPS' CROWN TELEPHONE. A hand magneto telephone, to attach to the various sets.
Number of instruments, 1,945: Price $5,105 63

No. 5. PHELPS' DOUBLE-CROWN TELEPHONE. An extra strong magneto telephone, to hang against a wall or box.
Number of instruments 33: Price $206 44

No. 15. PHELPS' CARBON TRANSMITTER. With iron handle, to attach to sets with a cord.
Number of instruments, 77: Price $172 95

No. 24. PHELPS' CARBON TRANSMITTER. To fit his jointed arm.
Number of instruments, 46: Price $99 19

No. 17. PHELPS' BEVEL CARBON TRANSMITTER.
To attach to his box sets.
Number of instruments, 10: Price, $101 25

No. 13. BERGMANN'S BEVEL CARBON TRANSMITTER. To attach to his box sets.
Number of instruments, 45: Price, $109 31

No. 19. ALL EXPERIMENTAL INSTRUMENTS are classed under this head.
Number of instruments, 72: Price $554 51

No. 22. PONY CROWNED HAND TELEPHONE.
Number of instruments, 15,101: Price $17,223 57

No. 30. PHELPS' MICROPHONE.
Number of instruments, 400: Price $855 00

No. 32. SWITCHMAN'S TELEPHONE, with Induction Coil.
Number of instruments, 223: Price $1,273 13

CHICAGO STYLES. GRAY BI-POLAR HAND TELEPHONE. Not made now.
Number of instruments, 384: Price $7,366 61

GRAY BATTERY HAND TELEPHONE. Not made now.
Number of instruments, 204: Price $1,087 50
GRAY BATTERY CALL BOX. Not made now.
Number of instruments, 100: Price $1,200 00
CHICAGO MAGNETO CALL BOX. Not made now.
Number of instruments, 684: Price $5,997 56

The prices stated are the prices which are to be paid for the number of instruments stated. Or a proportional part thereof is to be paid if the number of instruments varies from that stated.

At a special meeting of the stockholders of the National Bell Telephone Company, held at the Company's office, No. 95 Milk street, Boston, Mass., on Friday, October 24th, 1879, at 11 o'clock A. M.

Present, a legal quorum.

It was "*voted* that the president, treasurer and clerk of the National Bell Telephone Company are hereby authorized to execute and deliver an agreement with the Western Union Telegraph Company, acting for itself and the Gold and Stock Telegraph Company, the American Speaking Telephone Company and the Harmonic Telegraph Company, by subscribing and affixing the seal of the company to the contract to be prepared by council in accordance with the agreement signed by the special committee of said companies, and submitted to the stockholders at this meeting, with such alterations as shall be approved by the Board of Directors."

I certify that the foregoing vote is a true copy from the records of the stockholders of the National Bell Telephone Company, and that the agreement submitted to the stockholders at said meeting, and referred to in said vote, is the agreement dated September 27, 1879, by and between the Western Union Telegraph Company for itself, and the Gold and Stock Telegraph Company, American Speaking Telephone Company and Harmonic Telegraph Company, party of the first part, and the National Bell Telephone Company, party of the second part, a copy of which contract is placed on file.

At a meeting of the directors of the National Bell Telephone Company, duly called and held at the office of said company in Bos-

ton, on the 12th day of November, 1879, present a legal quorum, it was

"*Voted*, that the agreement made between the Western Union Telegraph Company, acting for itself and the Gold and Stock Telegraph Company, the American Speaking Telephone Company and the Harmonic Telegraph Company of the one part, and the National Bell Telephone Company of the other part, of which a copy has been laid before this board and placed on file, dated the 10th day of November, 1879, and signed, sealed and delivered by the president, treasurer and clerk of this corporation, in pursuance of authority heretofore given them, is hereby declared to be in accordance with the agreement of September 27, 1879, by and between the same parties, and is hereby authorized, approved, ratified and confirmed as the act and deed of this corporation."

I hereby certify that the foregoing is a true copy from the records of the directors of the National Bell Telephone Company, and that the agreement to which this certificate is attached is a true copy of the agreement in said vote referred to.

CHAS. EUSTIS HUBBARD,
Clerk of the National Bell Telephone Company.

Article IV. of the By-Laws of the Western Union Telegraph Company. "The Board of Directors may designate ten of their number, who, with the President, shall constitute an Executive Committee, who shall, for the time being, have and exercise all the powers of the Board of Directors in the management of the business and affairs of the company; and have the power to authorize the seal of the company to be affixed to all papers which may require it. The Executive Committee shall keep a record of their proceedings and report the same to the Board."

Extract from minutes Executive Committee meeting, November 12, 1879:

Whereas, heretofore, on the first day of October, the proposed contract between this company, the Gold and Stock Telegraph Company, the American Speaking Telephone Company, and the Harmonic Telegraph Company, of the first part, and the National Bell

Telephone Company of the second part, was, by vote of this committee, referred to the Law Committee with power to authorize the execution of the same in a form to be approved by said committee; and

Whereas, the form has been approved and the contract duly executed, on the 10th day of November, and the seal of the company thereto attached,

Resolved, That the form of said contract, as adopted and approved by the Law Committee, and the execution thereof by the President, and the attachment of the seal by the Secretary, is hereby approved, ratified and confirmed as the act of this company.

Seal Western Union Tel. Co.

A correct copy from the minutes:

A. R. BREWER,
Sec'y.

At a meeting of the Directors of the Gold and Stock Telegraph Company, held at the office of the company in New York, November 10, 1879. Present a quorum of the Board, it was

"Voted:

That the contract now presented to us for our approval between the Western Union Telegraph Company for itself, and the Gold and Stock Telegraph Company, the American Speaking Telephone Company, and the Harmonic Telegraph Company, which it represents, and the National Bell Telephone Company, dated November 10th, 1879, be approved, its execution authorized, and that the seal of the company be thereto affixed."

A true copy from the record:

Attest:

Seal Gold and Stock Tel. Co.

J. D. REID,
Sec.

At a special meeting of the Board of Directors of the American Speaking Telephone Company, in the City of New York, Oct. 30, 1879, a full quorum being present, it was

"Voted:

That the execution on behalf of this company of the proposed contract between the National Bell Telephone Company and the Western Union Telegraph Company, acting for itself, and this

company and others, be authorized and directed to be made under the corporate seal of this company, whenever the said contract shall have been approved and executed, on the part of the Gold and Stock Telegraph Company."

A true copy,

Seal American Speaking Telephone Co.

J. D. Reid,
Secretary.

Copy from the minutes of Harmonic Telegraph Co.

At a special meeting of the Directors of the Harmonic Telegraph Company, held Oct. 28, 1879, pursuant to a call.

Present — S. S. White and E. W. Andrews. The following resolution was submitted:

Resolved, That the President of this company is hereby authorized and directed to sign the contract on behalf of this company between the Western Union Telegraph Company for itself, and the Gold and Stock Telegraph Company, American Speaking Telephone Company, and the Harmonic Telegraph Company, party of the first part, and the National Bell Telephone Company, party of the second part, relative to an agreement made as to future royalties between said companies, and the Secretary of this company shall affix the seal of this company, and attest the same.

Passed unanimously.

A true copy,

Seal Harmonic Telegraph Co.

H. H. Duncklee,
Secy.

This cause was thence continued to the May Term of this Court, A. D. 1884, when, on the thirtieth day of June, 1884, the following Answer was filed: —

(2) ANSWER.

[Filed June 30, 1884.]

This defendant, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering saith:

It admits the incorporation, organization, citizenship, and residence of the several plaintiffs, as alleged in the bill.

It admits that on and before Nov. 10, 1879, the Western Union Telegraph Company was and that it still is engaged in the business of telegraphing; and that before and on said day said Western Union Telegraph Company and the other plaintiffs, or some of them, were engaged in the business of transmitting messages by telephone, and owned instruments, appliances, plants, and supplies, more or less useful in the prosecution of said business, and held or controlled patents of the United States which they claimed covered inventions useful in the art of transmitting messages by telephone; and that organizations had been established in various parts of the United States called Telephone Exchanges, intended to furnish telephone facilities to their several customers within limited areas, which exchanges could only engage in the business by obtaining the privilege from the owners of the patents covering the same; and that the Western Union Telegraph Company and the complainants had entered into contracts with telephone exchanges and with individuals assuming and purporting to grant licenses to such exchanges and individuals to use telephones and various appliances, methods and inventions by them owned or controlled; but how many such contracts were in existence, or whether the complainants were deriving any large revenues therefrom, and what was the form and the amount of the consideration therefor, the defendant is ignorant, and can neither admit nor deny.

But this defendant does not admit, but denies that the comp

ants or any of them, or the licensees of the complainants or any of them, had on or before Nov. 10, 1879, the right under said Letters Patent to engage in the business of transmitting messages by telephone; and on the contrary alleges that the right to engage in such business belonged exclusively to the National Bell Telephone Company, which owned certain patents of the United States, granted to Alexander Graham Bell, to the rights and ownership of which said National Bell Telephone Company, this defendant, has succeeded; and that neither the complainants nor their licensees nor any of them could lawfully engage in said business, unless authorized so to do by said the National Bell Telephone Company.

And this defendant admits that the Western Union Telegraph Company was interested in the capital stock of the other complainant corporations, and was authorized to represent them and each of them in negotiating and executing the agreement of Nov. 10, 1879, as set forth in said bill; and that the National Bell Telephone Company was organized and existed as therein alleged; and that said company has since Nov. 10, 1879, transferred to this defendant, a corporation organized under the laws of Massachusetts, all its property and rights, and that this defendant has assumed all the obligations and duties of the said National Bell Telephone Company, including its obligations under said contract of Nov. 10, 1879; and this defendant admits its liability and obligations, and claims its rights and privileges under said contract, as if originally named therein as a contracting party in lieu of the National Bell Company, and answers as to all its acts and doings under the name of the National Bell Telephone Company, as well as under its present name as the "defendant".

And this defendant admits that at the date above named it owned a number of patents of the United States covering instruments, inventions, and methods useful, valuable, and necessary for the transmission of messages by telephones, and also claimed the right to transmit call signals by electricity over wires in connection with its telephone system; and that it had contracts with telephone exchanges and individuals in the United States by which it had granted the right to use the said patented inventions, instruments and methods partly in consideration of certain rentals and royalties to be paid

therefor; but it does not admit, but denies that such rentals or royalties constituted the entire consideration of such grants.

This defendant admits that before Nov. 10, 1879, a controversy had arisen between the complainants and the defendant with reference to the rights and powers of each and of their grantees in the business of transmitting messages by telephone, each claiming that their exclusive rights were infringed by the other; and that litigation had arisen and further litigation was threatened as to the same. And the defendant says that the Bell Telephone Company, a predecessor in title of this defendant, brought suit against one Dowd, an agent of the companies complainant, to restrain him from the use of speaking telephones; that said suit was defended by said Western Union Telegraph Company, an answer filed, setting up a great variety of defences, and that the Western Union Telegraph Company made a vigorous defence and took testimony at great length and expense in support of their answer; that, after such testimony was closed or substantially closed, said companies complainant became convinced, as this defendant believed, that said Bell's patent was valid, and that said Dowd and these complainants and their grantees infringed it.

And that thereupon these complainants, owning or controlling certain patents upon electrical inventions which were claimed to be involved in the speaking telephone or used in connection therewith, opened negotiations with this defendant, which negotiations resulted in the agreement in writing whereof a printed copy is filed with the complainants' bill, and which is therein referred to and entitled "Contract of November 10, A. D. 1879," which agreement was ratified and approved as set forth in said bill.

And the defendant says that such copy is not in all respects an exact copy of the original thereof, and craves leave to refer to the original thereof here in court to be produced.

This defendant, further answering, admits that the bill correctly sets forth the extract from the first paragraph of Article I., the whole of Article IV., the first three paragraphs of Article V., and the whole of Articles VI. and VII. of said contract, and that the defendants agreed with the plaintiffs, as set forth in said extracts from said contract; but this defendant craves leave to refer to the other parts of said

all electrical speaking telephones now lawfully in use in the United States are the property of this defendant.

That at said time it was expected that the sole or chief business of the defendant's said predecessors, owners of the Bell patents, would consist in furnishing telephones; that the user thereof (hereinafter for convenience called the subscriber) would furnish his own lines and such auxiliary apparatus, if any, as might be necessary in using the telephones; and that at that time the sum of $10 (as a proper charge for the use of the telephone alone) was established as an annual rental and royalty for the use of a telephone.

That thereafter what is known as the exchange system was thought of, established and rapidly came into use; a system by which the circuits or wires of different subscribers are brought to a central office, attended by an agent of the exchange for the purpose of placing such subscribers in telephonic communication with each other; that the person or company establishing such a system furnishes, owns and maintains the wires connecting the subscribers with the office of the exchange, and the apparatus used at the subscribers' station, as well as the switch boards and other apparatus required at the central office of the system.

That under this system, in addition to the rental and royalty on the telephone charged the subscriber, a charge is made to him by the owner of the exchange for the use of connecting lines and apparatus at his station, and for the benefit of connecting with the exchange system and of the service furnished or performed by the exchange; that such systems grew rapidly in favor and became extensively established throughout the country; that the exchange business, so called, still remains the most highly developed branch of the telephone business; that the annual rental and royalty fixed as above was also the rental and royalty fixed for subscribers to the exchange system.

That on the day when said contract of Nov. 10 went into effect there were in operation in the United States, under privileges granted by this defendant company or its predecessors, about 100 exchanges; that before said date the complainants or some of them had established and there were in operation on said date, under claim of privilege from the complainants or some of them, a large number of exchanges

within the United States; that the complainants had established for the telephones furnished by them the same rate of rental that had been established by the defendant, and that the exchanges in operation under claim of privilege from them, in addition to the telephone rental and royalty charged the subscriber, charged him a further sum for the use of the lines connecting him with the central office and the apparatus at his station and for the benefit of the connection and advantage of the services rendered and performed.

And the defendant further alleges that the exchange business had proved to be profitable, and consequently the right to do an exchange business was valuable: that it was found that, over and above the telephone rental and royalty charged the subscriber, such a charge could be made him for the connection with the exchange, and for the use of the necessary call bells, batteries, wires and other appliances, and for services furnished and performed, and for enabling him to use the telephones furnished him advantageously, as would justify the expensive outlay and the risk involved in establishing such a system, and constructing the necessary plant, and would return large profits thereon; that this charge greatly exceeded the amount charged as rental or royalty on each telephone.

That prior to and at the date of said agreement of Nov. 10, in many instances the defendant's predecessors had established, owned and operated directly such exchange systems and received the profits thereof; that in other cases it had granted to others the privilege to do such business, such grantee agreeing to be diligent in the development and prosecution thereof, and to procure the telephones which it should need therein from said grantor, and at such rental and royalty as it had fixed or might from time to time fix therefor; that in many cases such grants were for short terms, at the expiration of which the defendant would be entitled to resume said business and receive the profits thereof; but that in certain other cases such grants were perpetual; and in such cases, in addition to the undertakings entered into by time licensees, as aforesaid, the defendant received a consideration for giving up in perpetuity its right to do such business; that the complainants well knew these facts, the method in which the defendant and its predecessors in title conducted their business

and made their licenses, and the consideration which they received from their licensees.

And the defendant further alleges that said contract of Nov. 10 expressly recognizes the state of things and the circumstances above described, and the method of business adopted by the defendant.

That it was therein agreed that the defendant should pay the complainants, as therein more particularly set forth, twenty per cent. of rentals and royalties for telephones, but that the complainants should not share, or be entitled to share, in the profits derived from call bells, batteries, wires and other appliances, or from services furnished or performed, that is to say, in the profits or advantages of the exchange business as above described and carried on by both parties hereto.

And still further to define the matter, it was provided that the rental and royalty to be charged for telephones should be uniform, and that the rental and royalty which, as aforesaid, had for long time been and then still was in use by both the parties, should be taken to be a standard rental and royalty.

And the defendant further says that the rental and royalty for telephones as aforesaid originally established and in use by the parties hereto, and recognized by said contract of Nov. 10, has, with the exception mentioned in the first paragraph of page 11* hereof, ever since been and still is the rental and royalty fixed by the defendant for the use of telephones.

And this defendant admits that by Article 1 of said agreement it agreed and became bound to pay to said party of the first part as follows: —

"ARTICLE 1. (1) The party of the second part shall pay to the party of the first part, upon all telephones used in the United States, under any license from the party of the second part, express or implied, unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid in accordance with the provisions of this contract, from licenses or leases, for speaking telephones (exclusive of call bells, batteries, wires, and other appliances or services furnished or performed). The rentals or royalties upon which said royalty or bonus to be paid to the party of the first part is to be reckoned, shall for that purpose be ascertained by deducting from the gross rental or royalty

* Second paragraph of page 68 of this record.

received or rated as hereinafter declared the commissions and allowances herein provided for."

And it avers that it did not become bound by said contract to pay to said party of the first part anything except twenty per cent. of all rentals or royalties which it might actually receive or which might be rated as paid in accordance with the provisions of said contract from licenses or leases for speaking telephones (exclusive of call bells, batteries, wires, and other appliances or services furnished or performed), after deducting the commissions and allowances therein provided for; and it avers further that it has paid to the party of the first part twenty per cent. of all sums it has actually received for rentals or royalties of telephones, exclusive of call bells, etc., or which should be rated as paid after deducting said commissions and allowances.

And this defendant further avers that the rentals or royalties actually received or rated as paid, twenty per cent. of which are to be paid to the party of the first part, are defined in Article 2 of said agreement as follows: —

"ARTICLE 2. Concerning the sum which is to be taken as the gross rental or royalty for the purposes of the preceding article, it is declared and agreed: —

(1) The word 'telephone', as used in the contract, refers to an instrument for electrically transmitting or receiving articulate speech, and is understood to mean either a transmitting instrument incapable of use as a receiver, a receiving instrument incapable of use as a transmitter, or an instrument capable of being used both as a transmitter and receiver.

(2) Ten dollars per annum for each telephone where only one is used at a terminal or station, and fifteen dollars per annum for a pair of telephones composed of an instrument used for sending and another instrument used for receiving, used at one terminal or station, are recognized as the present standard rates of gross rentals or royalties; and the party of the second part may change them, subject to the qualifications of Sects. (4) and (5) of this article, but not otherwise.

(3) Telephones used on exchanges or lines owned in whole or part by the party of the second part, or by auxiliary corporations or

organizations in which it is interested, or rented together with lines owned in whole or part by it, or by auxiliary corporations or organizations in which it is interested, shall be rated as paying to said second party the said recognized standard rates or such other rates as may hereafter be established in accordance with this contract for like uses by parties other than the second party or auxiliary corporations or organizations in which it is interested, less the commissions and allowances provided for by this contract; but whenever the party of the second part is or shall be interested with others in the ownership of such exchanges or lines, the annual rental or royalty actually charged to and received from the owners thereof for the use of the telephones, if greater than the rates established as aforesaid, shall be taken to be the gross rental for the purpose of ascertaining the stipulated bonus of royalty."

And this defendant further avers that by Sect. 7 of Article 2 of said agreement it was authorized as follows: —

"(7) The party of the second part may increase the established annual rate either generally or upon telephones used for any particular purpose, or by any particular class of licensees, from time to time at its discretion, and such higher rates, while in force, shall be taken to be the gross rentals or royalties in respect of the telephones for which they are obtained."

And it avers that in accordance with said agreement it has raised the said standard annual rentals or royalties of telephones used on exchanges from $15 per annum for a pair of telephones composed of an instrument used for sending and another instrument used for receiving, used at one terminal or station, to $20, and that such higher rates have been actually paid and received and are to be taken to be the gross rentals or royalties upon which, after deducting the commissions or allowances provided by said contract, the royalty or bonus of twenty per cent. to be paid to the party of the first part is to be reckoned; and this defendant avers that it has at all times paid to the said party of the first part the full amount of said royalty or bonus so reckoned.

And this defendant avers that, subject to the payment of the said twenty per cent. upon the standard annual rental or royalties recognized by said contract or fixed from time to time in accordance

therewith, it has the right to use telephones on all exchanges which it may see fit to establish or purchase and own, and to take to itself and retain for its own use all profits which it may receive therefrom; that such profits must arise not only from the use of the telephones themselves, but also from the use in connection therewith of call bells, batteries, wires and other appliances, and from services rendered and performed; and that it has been in some cases the sole owner of exchanges, and has rated itself as paying the standard annual rentals or royalties fixed for the time in accordance with the said contract, and, after deducting the commissions and allowances provided for, has in all such cases paid to said parties of the first part twenty per cent. of such royalties or rentals.

And this defendant further avers that it has the right to lease telephones to any company owning an exchange or lines in which it is interested, or to any parties with whom it is jointly interested in the ownership of such lines or exchange, upon the same terms for the standard rental or royalties recognized by said contract or fixed from time to time in accordance therewith; and to take for itself and retain for its own use any profits it may receive from such exchange or lines on account of its interest therein above the amount of such standard rental or royalties, in the same manner as if it owned such exchange or lines exclusively, and that any profits which may be derived from the use of telephones on such exchanges or lines are not due to the telephones alone, but must arise also from the use of call bells, batteries, wires, and other appliances, and from services rendered or performed, and the parties of the first part have no claim upon or interest in such profits, or any further claim upon the defendant than for the stipulated percentage upon said standard and established rentals.

And this defendant denies that it has granted to any persons, corporations or telephone exchanges the right to use telephones and, in lieu of the standard annual royalties or rentals recognized in said contract or fixed as therein provided or in partial lieu thereof, has accepted stocks or valuable paper, interests or property sold or delivered to itself, exclusively; but it admits that it has received in several cases from persons or corporations owning exchanges or lines, or proposing to establish them, stock or interest in the ex-

changes or lines, in consideration of the profits to be derived from the use of call bells, batteries, wires and other appliances, and from services furnished or performed, or in any other way in connection with telephones, and subject to the payment of the standard annual rents or royalties recognized by said contract or fixed in accordance therewith for the use of such telephones.

And the defendant further says that at the date of said agreement and in the further development of the business, and for some time after said tenth day of November, the licenses granted by it for the use of telephones and telephonic apparatus for exchange purposes were within small and limited areas, and were usually for comparatively short terms; that in said licenses the licensees undertook and were bound to increase the number of telephones used by them, and to supply, by the establishment of exchanges, all reasonable demands of the public, so far as the licensees were authorized to do so by their contracts; that it was further provided in said licenses that upon the termination thereof the defendant might take possession of the business and good will thereof, and of all the lines, fixtures, apparatus, appliances and premises of the licensee, used for the carrying on of the licensee's business, and occupy and operate the same, and might return the plant so taken within a certain time from the taking, paying a reasonable compensation for its use, or might retain the same as its own property — in that event paying therefor a reasonable price, not exceeding the actual cost; in substance that the defendant, after the licensee had established a business and constructed a plant, would upon the termination of the license, come into possession of an established and growing business, and the good will thereof, and might, paying therefor a reasonable price, not, however, exceeding the actual cost thereof, acquire the plant as its own. And the defendant annexes a form of such license marked "X" in use by it since Nov. 10, 1879, which said form was well known to the complainants.

That as such business was established and developed, it was found to be more profitable, from various considerations, that the business covered by licenses for contiguous territory should be consolidated, and that the licensees desired to retain the business established therein, and to continue in the prosecution thereof beyond the terms of

the licenses; that applications were made by its licensees to the defendant to consent to such consolidation, and such applicants further desired to arrange with the defendant that the defendant should give up its aforesaid right to have the business and to acquire the plant of such applicants as aforesaid; that in such cases agreements were entered into between such applicants and the defendant, whereby in substance such consolidation of business was agreed to and wherein such applicant agreed to the surrender, and the defendant to accept such surrender of the time licenses held by it, and the defendant agreed that it would for all time leave with the applicant the right to do such business, and would furnish such licensee with telephones embodying any inventions which it then owned, or might ever thereafter own or control, with the right to put out such telephones for use for certain purposes and within certain territory described in said agreement, and would further license it for all time to use such inventions in call bells, switches, switch boards and other apparatus needed for or adapted for use upon telephone lines which it, the defendant, then owned or might ever thereafter acquire; that in all such license contracts, as well in those for all time as those for short terms, the defendant provided that the other party thereto should charge its subscribers such rental and royalty of telephones as the defendant might fix from time to time, and should pay the defendant the amount so charged less certain discounts, differing in different cases; and that in all grants made by defendant, of the privilege to do business and agreements to furnish telephones therefor, whether for short times or in perpetuity, the defendant has reserved and still has the full and perfect right to fix, to decrease or to advance the rentals or royalties to be paid on telephones.

And the defendant further says, that in consideration of its consent to such consolidation, and especially in consideration of its giving up (except only in cases of default of the licensee) its right to take to itself the business and plant of the licensee at the time and upon the terms aforesaid, such licensee has, in each case, agreed to pay to the defendant a certain share of the profits of the business carried on by such licensee under said agreement and the license issued in pursuance thereof; and that to secure to the defendant its agreed share in said profits, it has been agreed that the licensee should fur-

nish and pay to the defendant a share of its capital stock which should bear the same proportion to the whole of the said capital that the agreed share of profits, as aforesaid, bore to the whole profits.

And the defendant further says that such practice, in case of its making a perpetual agreement with its licensee, and in consideration of the right given to the licensee to do business and to receive the profits thereof, of taking a certain portion of such profits represented by shares of stock in the capital of the company licensed as aforesaid, was well known to the complainants; that the complainants until shortly before filing this bill made no complaint thereof nor objected thereto, but on the contrary that they have recognized such course of dealing.

That it has made such agreements with the parties named in the schedule hereto annexed marked "A". That in many cases it has agreed to waive or surrender the dividends which it should be entitled to receive on said stock for a certain period; that in said schedule the first column contains the names of the companies with which the defendant has so dealt, the second column the amount of the capital stock of said companies respectively as the same stand now fixed, the third column the number of shares of such capital stock which the defendant has received in consideration of the right to do business as aforesaid, and the fourth column the period for which the defendant has agreed to waive or surrender its dividends. That said schedule contains a complete list of all such contracts, which contracts are herewith exhibited for the inspection of the complainants.

Further answering, the defendant admits that paragraph 1, of Article 13, of said agreement of Nov. 10, A. D. 1879, is correctly quoted in the complainants' bill; but the defendant craves leave to refer to the whole of said contract, or such part thereof as may be necessary for the proper understanding of the rights of the parties in the premises.

And further answering, the defendant admits that since the execution of said contract of Nov. 10, it has in many instances granted to various parties, in many cases parties other than those already holding exchange or private line licenses, the right to connect telephonic districts or exchange systems, and has licensed the use of telephones therefor.

And the defendant, further answering, says that for such use of telephones it has charged and received only the standard rental or royalty as fixed by said contract, and increased as set forth in the first paragraph of page 11 *hereof.

And the defendant denies that it refuses to account for or to pay to the orators any portion of such royalties or rentals, or any percentage thereof, but alleges the contrary thereof to be true, and alleges that it has kept and performed in every respect all its duties and obligations arising under said agreement in that behalf, and that it has paid and is paying, and intends at all times to pay to the complainants its proper share of all rentals and royalties, charged and received by it for such use, according to the terms of said contract and according to the true intent thereof.

And the defendant further says that in granting to others the right to such extra-territorial line business, the defendant has, in consideration of such right to do business, received a certain share of the subscription and tolls received by the grantee in the prosecution thereof, that it annexes hereto a form of its contract for extra-territorial lines, marked "Y", which said form was well known to the complainants, and that it exhibits herewith a schedule of all such contracts made by it, together with the contracts themselves for complainants' inspection: said schedule is marked "B".

And this defendant, further answering, says that (subject to certain rights reserved to the complainants in said contract of Nov. 10, 1879, for their own use, and which in no way relate to or affect the obligations of the defendant to account to the complainants) the complainants by and according to the true purport, construction and effect of said contract, and the intent of the parties thereto in fact and as evidenced thereby, agreed therein to accept in full satisfaction and compensation for all considerations moving from them to the defendant at the making thereof, and for all rights by them parted with thereby, and for all conveyances, covenants and agreements by them made therein or thereunder, a definite proportion, to wit, twenty per cent. of a certain sum per annum upon each telephone which should be used or licensed to be used by the defendant, said sum being therein designated as a rental or royalty on each telephone,

*Second paragraph of page 68 of this record.

subject to certain discounts or allowances therein specified. That said sum was in said contract fixed and established at $10 for each telephonic transmitter or receiver and $15 for each pair of telephones, to wit, a transmitter and receiver; that said fixed and established rental was uniform and the same upon each and every telephone, or pair of telephones, however great or small the use thereof or the value of such use, and whether the same were used in telephonic exchanges, or for connecting such exchanges by what were and are known as extra-territorial lines; and that it was the intent of said agreement and of the parties thereto that such rates and rentals should continue so to be uniform and alike except as hereinafter stated.

That by and under said agreement, the defendant had the right, from time to time, to reduce the said annual rental so fixed and established, provided, however, that the sum to be paid to the complainants for its proportion of such rental should not be reduced below $1.00 for each telephone, and $1.80 for each pair of telephones, except with the consent of the complainants, or by arbitration, as provided in said agreement, and the right to increase such annual rental at its discretion; and that said rental as established, or as the same might be by the defendant increased or diminished, was to be a uniform rental for each telephone or pair of telephones, except that in case of increase thereof such increase might be made either generally upon all telephones, or upon telephones used for any particular purpose, or by any particular class of licensees, but in either case uniformly upon telephones used for such purpose or by such class.

That the defendant was under no obligation by reason of anything in said contract contained, either to increase or to decrease said rental upon all or any telephones except at its own discretion and for its own interest, or to consult or regard in any manner the interest of the complainants in making or not making such increase or diminution in said rentals from that fixed in said contract.

And this defendant says that soon after the making of said agreement of Nov. 10, 1879, it increased the established rental for each pair of telephones from $15 to $20, as it had full right to do, and that it has required, and so far as possible enforced the payment of such established rental uniformly upon each telephone and of such

increased rental upon each pair of telephones used under all licenses granted by it, or used by itself and any associates, or by the subscribers to any telephone exchange operated under any grant or license from it or on any connecting or extra-territorial line so operated; and that it has at all times accounted for the same to the complainants, subject to the discounts and allowances in said contract provided, and that, otherwise than as above stated, it has made no increase or diminution in the rate of rental of telephones as established by said agreement.

And the defendant says that under said contract of Nov. 10, 1879, (subject to the limitations above referred to and in no way affecting the obligation of the defendant) and by the true construction and intent thereof, and of the parties thereto, the complainants had and were to have no share, ownership or interest in the business of operating telephones, or of establishing or conducting telephone exchanges, or connecting or extra-territorial lines, or of licensing others to carry on such business, nor any share, ownership or interest in the profits of such business, whether conducted by the defendant or its grantees or licensees; and that said business and the profits thereof belonged wholly to this defendant, with full right to conduct the said business in all parts of the United States by itself, or in association with others under corporate form or otherwise, or to license others to conduct the same on such terms as it should see fit, and to receive all or any portion of the profits of such business, whether done by itself or by others, or by itself and associates as aforesaid, and to dispose of such profits to his own use without accounting in any manner to the complainants for any part thereof; and that in negotiating with any and all parties for the sale by it of any grants or licenses to carry on said business it had full right to stipulate for the payment to it of any portion of the profits which might ensue from the business to be done under such grants or licenses, or to capitalize the same, or to receive in lieu thereof, or in consideration of such grants or licenses, such sums of money, shares or other property or valuable consideration as it should see fit to its own sole use; provided it should account to the complainants for the agreed proportion of the fixed annual rental on each telephone used by it, or by itself and its associates, or by its or their licensees and the subscribers

thereof in the said business; and that whatever profits it has made or may make in its own business of establishing and operating telephone exchanges or connecting and extra-territorial telephone lines, and whatever sums of money, shares or other consideration it may have received or may receive from other parties for licenses to do the like business, paying as part of the expenses of their business said established annual rentals, or what sum of money, shares or other consideration it has received or may receive from any associates, whether under corporate form or otherwise, as a compensation and consideration for the right to do the like business, paying the like rental as part of their expenses, is no concern of the complainants, and that the defendant is in no way bound to account to them for any part thereof.

And this defendant, further answering, says, that a large part of the value of the business of operating telephone exchanges and connecting lines between telephone exchanges consists in, and the profits thereof are in large part derived from, the use of call bells, batteries, wires and other appliances, and from services furnished and performed for the subscribers in the use of telephone exchanges and connecting lines; and that of the amounts paid by each such subscriber, for such use, only a small proportion is due to, or is paid by reason of the rental of telephones, and that such was the case at the date of said contract of Nov. 10, 1879, and has ever since been the case.

And this defendant says that, other than the sums by it received for rentals, and accounted for to the plaintiffs under said agreement, all sums of money, shares, stock and other considerations by it derived from its business in operating telephones, or telephone exchanges or connecting lines, or by it received from any and all persons or corporations from whom or from which it has received corporate shares or other considerations as hereinbefore fully answered and disclosed, and all profits by it derived under or in consideration of the licenses or leases hereinbefore set forth, have been received by it in consideration of its supplying to others, in conducting itself the business of telephonic communication, the use of such call bells, batteries, wires and other appliances, and of its furnishing such services as were needed in the use of telephones by

its subscribers, or in consideration of its grants to others, as hereinbefore set forth, of the right to license their subscribers to use such appliances, and of the right to render to such subscribers such services and to receive compensation therefor, and in consideration of its grants to others of the right to conduct the business which the defendant had the right either to conduct or to sell to others and enable them to conduct, and in further consideration of its agreements to refrain from carrying on such business in competition with its licensees, and of its other agreements and stipulations made, and of other rights by it granted in the licenses hereinbefore referred to and scheduled, and herewith produced; and that the considerations by it so received have been in no part received for or in lieu of any rental or royalty to which or any part of which the plaintiff is entitled.

Touching the specific interrogatories propounded in the complainants' bill, the defendant submits that the same have been sufficiently answered by the matters hereinbefore stated, wherefore it prays that it may not be required to make a further answer thereto.

Without this, that there is any other matter, cause or thing, in the said complainants' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges, in this behalf most wrongfully sustained.

[SEAL] THE AMERICAN BELL TELEPHONE COMPANY,
by W. H. FORBES, *President.*

JOHN E. HUDSON,
Defendant's Solicitor.

E. R. HOAR,
W. G. RUSSELL,
CHAUNCEY SMITH,
of Counsel.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, ss.

On this fifteenth day of May, A. D. 1884, before me personally appeared William H. Forbes, who, being duly sworn, deposes and says that The American Bell Telephone Company, defendant herein, is a corporation organized under the laws of the Commonwealth of Massachusetts, and that he is president of said corporation; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

W. H. FORBES.

Subscribed and sworn to before me this fifteenth day of May, A. D. 1884. Witness my hand and official seal.

[SEAL] PHILIP S. STONE,
Notary Public.

[MEMORANDUM. Form of license marked "X", and form of contract marked "Y", and schedules marked "A" and "B", referred to in the foregoing answer, were filed May 23, 1890, as Schedules A and B and Exhibits X and Y of Defendant's Answer. ALEX. H. TROWBRIDGE, *Clerk.*]

This cause was thence continued to the October Term of this court, A. D. 1884, when, on the nineteenth day of November, 1884, the following Replication was filed: —

(3) REPLICATION.

[FILED NOV. 19, 1884.]

The Replication of the WESTERN UNION TELEGRAPH COMPANY *et al., Complainants, to the Answer of the* AMERICAN BELL TELEPHONE COMPANY, *Defendant.*

This repliant, saving and reserving unto itself all and all manner of advantages of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and

prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

THE WESTERN UNION TELEGRAPH COMPANY ET AL.,
Complainants,

By HALE & WALCOTT, *their Attorneys.*

JOHN F. DILLON,
WAGER SWAYNE,
GEORGE S. HALE,
of Counsel.

This cause was thence continued from term to term to the May term, A. D. 1886, of this Court, when, on the twenty-fourth day of May, 1886, the following Agreement was filed: —

(4) AGREEMENT FOR REFERENCE TO MASTER.

[FILED MAY 24, 1886.]

It is agreed that the above named cause may be referred to the Hon. John Lowell as Master to hear the parties, report the facts, with such part of the testimony as either party shall request and his rulings on any question of law arising in the case.

W. G. RUSSELL,
for Defendant.
DILLON & SWAYNE,
HALE & WALCOTT,
for Complainants.

Thereupon the following Order of Court was entered, the Hon. Thomas L. Nelson, District Judge, sitting: —

(5) ORDER OF COURT.

MAY 28, 1886.

NELSON, J. And now, to wit May 28, 1886, upon agreement of parties filed, It is ordered that the above named cause be referred to Hon. John Lowell as Master to hear the parties and report the facts with such part of the testimony as either party shall request and his rulings on any question of law arising in the case.

By the court,

ALEX. N. TROWBRIDGE,
Deputy Clerk.

This cause was thence continued from term to term to the October Term, A. D. 1887, of this Court, when the following Agreement was filed: —

(6) AGREEMENT FOR APPOINTMENT OF EXAMINER.

[FILED NOV. 7, 1887.]

It is hereby agreed that Geo. F. Betts, Esq., of the city of New York, United States Commissioner, may be appointed Examiner to take evidence in this case, and the testimony of any witnesses produced before him by either party.

W. G. RUSSELL, *for Defendant.*
GEO. S. HALE, *for Plaintiffs.*

NOV. 7, 1887.

Thereupon, on the sixteenth day of November, 1887, the following Order of Court was entered, the Hon. LeBaron B. Colt, Circuit Judge, sitting: —

(7) ORDER OF COURT.

NOVEMBER 16, 1887.

COLT, J. By agreement of parties it is ordered by the Court that George F. Betts, Esq., United States Commissioner for the Southern District of New York, be, and he hereby is, appointed Examiner to take the testimony of any witness produced before him by either party in the above cause.

By the Court,

JOHN G. STETSON, *Clerk.*

This cause was thence continued from term to term to the May Term of this Court, A. D. 1890, when on the twenty-third day of May, 1890, the following Schedules A and B, and Exhibits X and Y of defendant's answer were filed:

(8) SCHEDULE A OF DEFENDANT'S ANSWER.

[FILED MAY 23, 1890.]

NAME OF COMPANY.	CAPITAL STOCK.	Holding of A. B. T. Co. received in consideration of the right to do business.	PERIOD OF WAIVER OF DIVIDENDS.
The Bell Telephone Co. of Buffalo	$600,000	$210,000	To Jan. 1, 1886
The Bell Telephone Co. of Missouri	400,000	120,000	Jan. 1, 1882
Central New York Telephone and Telegraph Co.	500,000	175,000	Mch. 1, 1885
Central Pennsylvania Telephone and Supply Co	200,000	20,000	Jan. 1, 1886
Central Union Telephone Co.	6,605,300	2,311,900	$736,500 July 1, '85 1,575,400 July 1, '87
Chesapeake and Potomac Telephone Co.	2,650,000	630,000	378,000 Apl. 1, '83 252,000 Apl. 1, '86
City and Suburban Telegraph Association	1,800,000	540,000	Sept. 10, 1888
The Colorado Telephone Co.	1,200,000	600,000	Jan. 1, 1888
East Tennessee Telephone Co.	100,000	30,000	June 1, 1885
The Empire State Telephone and Telegraph Co.	150,000	52,500	June 1, 1885
Great Southern Telephone Co.	2,000,000	900,000	180,000 Oct. 1, '84 180,000 Oct. 1, '85 180,000 Oct. 1, '86 180,000 Oct. 1, '87 180,000 Oct. 1, '88
Hudson River Telephone Co.	1,800,000	630,000	July 1, 1886
Iowa and Minnesota Telephone Co.			
Iowa Union Telephone and and Telegraph Co.			$175,000 July 1, '83 175,000 Jan. 1, '86
Missouri and Kansas Telephone Co.	1,000,000	350,000	
Nebraska Telephone Co.	500,000	250,000	July 1st, 1887 720,000 July 1, '84
New England Telephone and Telegraph Co.	12,000,000	4,268,000	600,000 Oct. 1, '84 600,000 Oct. 1, '85 600,000 Oct. 1, '86 600,000 Oct. 1, '87 600,000 Oct. 1, '88 548,000 Oct. 1, '89
New York and Pennsylvania Telephone and Telegraph Co.	1,000,000	350,000	Not exceeding 6% Dec. 31st, 1884

North Pennsylvania Telephone Co.	$150,000	$52,500	Jan. 1, 1884
Ohio Valley Telephone Co.	400,000	140,000	Jan. 1, 1886
Pennsylvania Telephone Co., The	600,000	210,000	July 1, 1885
Rocky Mountain Bell Telephone Co.	800,000	400,000	Jan. 1, 1888
Southern Massachusetts Telephone Co., The	200,000	60,000	Jan. 1, 1889
Southern New England Telephone Co., The			
United Telephone Co.	700,000	350,000	Jan. 1, 1887
Wisconsin Telephone Co.	800,000	280,000	Not exceeding 7% July 1, 1884

In addition to the companies above named, the defendant has made similar agreements with the following named companies: —

1. Bell Telephone Company, of Philadelphia.

   Agreement with T. E. Cornish, June 3, 1879.

   do. do. Bell Telephone Company of Philadelphia, on or about Nov. 10, 1879, in pursuance of said agreement with Cornish.

   do. do. Gold and Stock Company of Philadelphia, Local Telegraph Co. of Philadelphia, and Bell Telephone Co. of Philadelphia, relating to said agreement with the Bell Telephone Co. of Philadelphia.

2. Central District and Printing Telegraph Company.

   Nov. 28, 1879; agreement for Ten Years with provision that, at the expiration of said ten years, said Central District and Printing Telegraph Co. "shall in such manner as may be in accordance with law increase its capital stock to the extent of fifty per cent. and shall issue and deliver such increase to said party of the first part, who in return shall, in consideration therefor, extend this agreement for the further period of ninety (90) years from said date."

The defendant has also made certain agreements, which have since been determined with companies, which have been merged in certain of the companies above named, namely: with

The Elmira Bell Telephone Exchange, Feb. 17, 1880, since merged in New York and Pennsylvania Telephone and Telegraph Company.

Midland Telephone Company, Aug. 18, 1881, since merged in Central Union Telephone Company.

Central Telephone Company, March 1, 1882, since merged in Central Union Telephone Company.

Western Telephone Company, March 1, 1882, since merged in Central Union Telephone Company.

Telephone Exchange Company, May 23, 1882, since merged in the Chesapeake and Potomac Telephone Company.

The Hudson River Telephone and Telegraph Company, April 20, 1882, since merged in Hudson River Telephone Company.

The Bay State Telephone Company, Sept. 1, 1882, since merged in New England Telephone and Telegraph Company.

Boston & Northern Telephone Company, Jan. 22, 1881, since merged in New England Telephone and Telegraph Company.

(9) SCHEDULE B OF DEFENDANT'S ANSWER.

[FILED MAY 23, 1890.]

NAME OF COMPANY.	TERRITORY.	Form.	Date of Execution.	Date of Expiration.
The Bell Telephone Co. of Buffalo.	Counties of Erie, Genesee, Livingston, Monroe, Niagara, Orleans and Wyoming, State of New York.	113 D.	Feb. 1, '83.	Perpetual.
do.	Rochester, N. Y., to Canandaigua, N. Y.	113 C.	Oct. 1, '83.	6 mos. not.
do.	Rochester, N.Y., to Lyons, N. Y.	"	Jan. 21, '84.	6 mos. not by lic'sor.
The Bell Telephone Co. of Missouri.	St. Louis, Mo. to Alton, Ill., via Mitchell.	"	June 9, '82.	Perpetual.
do.	St. Louis, Mo., to St. Charles, Mo.	"	Jan. 10, '83.	"
do.	St. Louis, Mo., to Highland, Ill.	"	Feb. 15, '83.	"
do.	St. Louis, Mo., to Alton, Ill., via Collinsville.	"	"	"
do.	St. Louis, Mo., to Belleville, Ill.	"	Mch. 8, '83.	"
do.	Belleville, Ill., to Marissa, Ill.	"	Aug. 10, '83.	"
Bundy, C. H.	Middletown to Lebanon, Ohio.	"	Apr. 25, '81.	Feb. 1, '86.
do.	Middletown to Hamilton, Ohio.	"	Sep. 1, '81.	Oct. 1, '86.
do.	Lebanon to Cincinnati, Ohio.	"	Nov. 16, '82.	Dec. 1, '87.
do.	Lebanon to Xenia, Ohio.	"	Nov. 1, '83.	May 1, '87.
Central District & Printing Telegraph Co.	Meadville to Erie, Penn.	"	Oct. 31, '83.	6 mos. not
Central New York Telephone & Telegraph Co.	Counties of Chenango, Hamilton, Herkimer, Jefferson, Lewis, Madison, Oneida, Otsego, St. Lawrence & Delaware, *New York.*	113 D.	Jan. 6, '83.	Perpetual.
do.	Norwich, N. Y., to Binghamton, N. Y.	113 C.	Oct. 24, '83.	6 mos. not.
do.	Oneida, N.Y., to Syracuse, N. Y.	"	Aug. 1, '83.	6 mos. not.
Central Pennsylvania Telephone & Supply Co.	Counties of Blair, Cameron, Centre, Clearfield, Clinton, Columbia, Huntingdon, Juniata, Lycoming, Mifflin, Montour, Northumberland, Snyder, Union, & Sullivan, *Pennsylvania.*	113 D.	Dec. 23, '82.	Perpetual.
do.	Bloomsburg to Wilkesbarre, Penn.	113 C.	July 13, '83.	6 mos. not
do.	Shamokin to Pottsville, Penn.	"	July 18, '83.	6 mos. not.

Central Union Telephone Company, Chicago, Ill.	Akron, Ohio, to Medina, Ohio.	113 C.	Feb. 13, '84.	Perpetual.
do.	Albion, Ill., to Evansville, Ind.	"	Sep. 4, '83.	6 mos. not.
do.	Bluffton, Ind., to Marion, Ind.	"	Oct. 30, '83.	6 mos. not.
do.	Cedar Rapids, Iowa, to Nugent's Grove, Iowa.	"	Sep. 13, '83.	6 mos. not.
do.	Chatsworth, Ill., to El Paso, Ill.	"	Sep. 8, '83.	Perpetual.
do.	Decatur, Ill., to Monticello, Ill.	"	Oct. 8, '83.	"
do.	Findlay, Ohio, to Fostoria, Ohio.	"	Sep. 24,'83.	"
do.	Findlay, Ohio, to Upper Sandusky, Ohio.	"	Sep. 23,'83.	"
do.	Galesburgh, Ill., to Galva, Ill.	"	Feb. 13, '84.	"
do.	Greencastle, Ind., to Brazil, Ind.	"	Feb. 29, '84.	"
do.	Havana, Ill., to Canton, Ill.	"	Sep. 20, '83.	"
do.	Madison, Ind., to Vevay, Ind.	"	Oct. 31, '83.	By notice.
do.	Madison, Ind., to Louisville, Ky.	"	Sep. 20, '83.	6 mos. not.
do.	Mansfield, Ohio, to Loudonville, Ohio.	"	Sep. 8, '83.	Perpetual.
do.	Marion, Ind., to Huntington, Ind.	"	Sep. 18, '83.	6 mos. not.
do.	Mason City, Ill., to Petersburgh, Ill.	"	Sep. 11, '83.	Perpetual.
do.	Marysville, Ohio, to Urbana, Ohio.	"	Sep. 12, '83.	"
do.	Medina, Ohio, to Oberlin, Ohio.	"	Apr. 30, '84.	"
do.	Mount Vernon, Ohio, to Sunbury, Ohio.	"	Sep. 24, '83.	"
do.	Newark, Ohio, to Mount Vernon, Ohio.	"	Sep. 12, '83.	"
do.	Norwalk, Ohio, to Oberlin, Ohio.	"	Sep. 8, '83.	"
do.	Painesville, Ohio, to Chardon, Ohio.	"	Apr. 30, '84.	"
do.	Peoria, Ill., to Bloomington, Ill., via Lilly and Mackinaw.	"	Sep. 11, '83.	"
do.	Peoria, Ill., to Canton, Ill., via Lancaster.	"	Sep. 11, '83.	"
do.	Peoria, Ill., to Delavan, Ill.	"	Sep. 12, '83.	"
do.	Peoria, Ill., to Minonk, Ill.	"	Jan. 4, '84.	"
do.	Pittsfield, Ill., to Hannibal, Mo.	"	Apr. 18, '84.	6 mos. not.
do.	Princeton, Ill., to Lacon, Ill.	"	Sep. 8, '83.	Perpetual.
do.	South Bend, Ind., to La Porte, Ind.	"	Sep. 12, '83.	6 mos. not.
do.	Springfield, Ill., to Carlinville, Ill.	"	Sep. 24, '83.	Perpetual.
do.	Springfield, Ohio, to Xenia, Ohio.	"	Apr. 26, '84.	6 mos. not.
do.	Toledo, Ohio, to Defiance, Ohio.	"	Apr. 17, '84.	6 mos. not.

Central Union Telephone Company, Chicago, Ill.	Toulon, Ill., to Galva, Ill.	113 C.	Sep. 11, '83.	Perpetual.
do.	Washington C. H., Ohio, to Springfield, Ohio.	"	Sep. 18, '83.	"
do.	Wilmington, Ohio, to Cincinnati, Ohio.	"	Sep. 21, '83.	6 mos. not.
do.	Winchester, Ind., to Muncie, Ind.	"	Sep. 11, '83.	6 mos. not.
do.	Zanesville, Ohio, to Coshocton, Ohio.	"	Sep. 21, '83.	Perpetual.
do.	Zanesville, Ohio, to Lancaster, Ohio.	"	Oct. 8, '83.	"
do.	Zanesville, Ohio, to New Lexington, Ohio.	"	Sep. 18, '83.	"
Assignee of Central Telephone Company.	Lebanon to Indianapolis via Zionsville.	"	Jan. 12, '83.	"
do.	Columbus to Franklin, Ind.	"	Jan. 29, '83.	July 1, '86.
Central Telephone Company, Chicago, Ill.	Alton, Ill., to St. Louis, Mo., via Collinsville, Ill.	"	Feb. 15, '83.	Perpetual.
do.	Alton, Ill., to St. Louis, Mo., via Mitchell, Ill.	"	June 9, '82.	"
do.	Anderson, Ind., to Indianapolis, Ind.	"	July 19, '82.	"
do.	Anderson, Ind., to Marion, Ind.	"	Dec. 11, '82.	"
do.	Anderson, Ind., to Noblesville, Ind.	"	Nov. 23, '82.	"
do.	Belvidere, Ill., to Garden Prairie, Ill.	"	Mch. 5, '83.	"
do.	Belvidere, Ill., to Rockford, Ill.	"	Mch. 5, '83.	"
do.	Bloomington, Ill., to Champaign, Ill.	"	Mch. 17, '83.	"
do.	Bloomington, Ill., to Clinton, Ill.	"	Aug. 15, '82.	"
do.	Bloomington, Ill., to Gibson City, Ill.	"	Jan. 4, '83.	"
do.	Bloomington, Ill., to Lincoln, Ill.	"	Feb. 10, '83.	
do.	Bloomington, Ill., to Pontiac, Ill.	"	Aug. 13, '82.	"
do.	Bloomington, Ill., to Peoria, Ill.	"	Nov. 23, '82.	"
do.	Cambridge City, Ind., to Eaton, Ohio.	"	Aug. 30, '82.	"
do.	Cambridge City, Ind., to Rushville, Ind.	"	June 28, '83.	"
do.	Canton, Ill., to Macomb, Ill.	"	Feb. 10, '83.	"
do.	Canton, Ill., to Peoria, Ill.	"	Nov. 23, '82.	"
do.	Carthage, Ill., to Keokuk, Ia.	"	Apr. 27, '83.	6 mos. not.
do.	Centralia, Ill., to Mt. Vernon, Ill.	"	Apr. 2, '83.	Perpetual.
do.	Centralia, Ill., to Nashville, Ill.	"	May 1, '83.	"
do.	Columbus, Ind., to Seymour, Ind.	"	Jan. 29, '83.	July 1, '86.
do.	Columbus, Ind., to Shelbyville, Ind.	"	Jan. 29, '83.	"

Central Telephone Company, Chicago, Ill.	Connersville, Ind., to Cambridge City, Ind.	113 C.	Mch. 13, '83.	July 1, '86.
do.	Crawfordsville, Ind., to Lebanon, Ind.	"	July 19, '82.	"
do.	Danville, Ill., to Hoopston, Ill.	"	Mar. 13, '83.	Perpetual.
do.	Danville, Ill., to Paris, Ill.	"	Mar. 13, '83.	"
do.	Decatur, Ill., to Clinton, Ill.	"	Aug. 25, '82.	"
do.	Decatur, Ill., to Hammond, Ill.	"	May 4, '83.	"
do.	Delavan, Ill., to Mason City, Ill.	"	Nov. 23, '82.	Dec. 1, '87.
do.	Delphi, Ind., to LaFayette, Ind.	"	June 7, '83.	6 mos. not.
do.	Delphi, Ind., to Logansport, Ind.	"	May 1, '83.	6 mos. not.
do.	Dixon, Ill., to Morrison, Ill.	"	Feb. 13, '83.	Perpetual.
do.	Fowler, Ind., to LaFayette, Ind.	"	Oct. 17, '82.	"
do.	Frankfort, Ind., to Kokomo, Ind.	"	Sep. 6, '82.	"
do.	Frankfort, Ind., to LaFayette, Ind.	"	Apr. 15, '82.	"
do.	Frankfort, Ind., to Lebanon, Ind.	"	July 19, '82.	"
do.	Franklin, Ind., to Indianapolis, Ind.	"	Apr. 22, '82.	
do.	Franklin, Ind., to Columbus, Ind.	"	Jan. 29, '83.	"
do.	Galena, Ill., to Dubuque, Ia.	"	Aug. 21, '82.	"
do.	Galesburgh, Ill., to Monmouth, Ill.	"	Mar. 29, '82.	"
do.	Galesburgh, Ill., to Peoria, Ill.	"	Nov. 23, '82.	"
do.	Geneseo, Ill., to Davenport, Ia.	"	May 17, '82.	"
do.	Geneseo, Ill., to Galva, Ill.	"	May 4, '83.	"
do.	Greencastle, Ind., to Indianapolis, Ind.	"	Apr. 25, '82.	"
do.	Greencastle, Ind., to Terra Haute, Ind.	"	Aug. 24, '82.	"
do.	Hartford City, Ind., to Bluffton, Ind.	"	Mar. 2, '83.	"
do.	Hartford City, Ind., to Marion, Ind.	"	July 6, '82.	"
do.	Hartford City, Ind., to Portland, Ind.	"	Mar. 17, '83.	"
do.	Hartford City, Ind., to Union City, Ind.	"	June 19, '83.	6 mos. not.
do.	Highland, Ill., to St. Louis, Mo.	"	Feb. 15, '83.	Perpetual.
do.	Jacksonville, Ill., to Winchester, Ill.	"	June 28, '83.	"
do.	Kankakee, Ill., to Cabery, Ill.	"	Dec. 4, '82.	"
do.	LaPorte, Ind., to Michigan City, Ind.	"	Mch. 1, '82.	
do.	Lebanon, Ind., to Indianapolis, Ind., via Eagle Village.	"	July, 19, '83.	"

Central Telephone Company, Chicago, Ill.	Lincoln, Ill., to Decatur, Ill.	113 C.	Apr. 12, '83.	Perpetual.
do.	Lincoln, Ill., to Peoria, Ill.	"	Nov. 23, '82.	"
do.	Marshall, Ill., to Terre Haute, Ind.	"	Mch. 29, '82.	"
do.	Martinsville, Ind., to Franklin. Ind.	"	Apr. 26, '83.	"
do.	Martinsville, Ind., to Indianapolis, Ind.	"	July 19, '82.	"
do.	Matoon, Ill., to Champaign, Ill.	"	Mch. 13, '83.	"
do.	Matoon, Ill., to Paris, Ill.	"	Mch. 15, '83.	"
do.	Mendota, Ill., to La Salle, Ill.	"	Mch. 27, '82.	"
do.	Mendota, Ill., to Princeton, Ill.	"	June 14, '82.	"
do.	Monticello, Ind., to Logansport, Ind.	"	Mch. 17, '83.	"
do.	Mt. Sterling, Ill., to Quincy, Ill.	"	Feb. 8, '83.	"
do.	Muncie, Ind., to Anderson, Ind.	"	Mch. 13, '83.	"
do.	Newcastle, Ind., to Anderson, Ind.	"	May 28, '83.	"
do.	Newcastle, Ind., to Cambridge City, Ind.	"	May 28, '83.	"
do.	Noblesville, Ind., to Indianapolis, via Castleton.	"	July 8, '82.	"
do.	Noblesville, Ind., to Indianapolis, Ind., via Nora.	"	Sept. 1, '82.	"
do.	Noblesville, Ind., to Kokomo, Ind.	"	Jan. 4, '83.	"
do.	Paris, Ill., to Terre Haute, Ind.	"	Mch. 29, '82.	"
do.	Peoria, Ill., to El Paso, Ill.	"	Jan. 23, '83.	Jan. 1, '88.
do.	Peoria, Ill., to Havana, Ill.	"	Jan. 23, '83.	"
do.	Peoria, Ill., to Lacon, Ill.	"	Jan. 23, '83.	"
do.	Peoria, Ill., to Toulon, Ill.	"	Jan. 23, '83.	"
do.	Petersburgh, Ill., to Beardstown, Ill.	"	Nov. 7, '82.	Perpetual.
do.	Polo, Ill., to Dixon, Ill.	"	Jan. 16, '83.	"
do.	Polo, Ill., to Mt. Carroll, Ill.	"	Feb. 13, '83.	"
do.	Polo, Ill., to Rockford, Ill.	"	Jan. 13, '83.	"
do.	Pontiac, Ill., to Joliet, Ill.	"	Nov. 27, '82.	"
do.	Princeton, Ill., to La Salle, Ill.	"	Mch. 27, '82.	"
do.	Richmond, Ind., to Greenville, Ohio.	"	June 5, '82.	"
do.	Richmond, Ind., to Liberty, Ind.	"	Sep. 25, '82.	"
do.	Rushville, Ind., to Hamilton, Ohio.	"	Mch. 13, '83.	"
do.	Rushville, Ind., to Indianapolis, Ind.	"	Mch. 8, '83.	"
do.	Rushville, Ind., to Newcastle, Ind.	"	Dec. 4, '82.	Jan. 1, '87.
do.	Sandusky, Ohio, to Fremont, Ohio.	"	Apr. 27, '83.	6 mos. not.
do.	Sandusky, Ohio, to Norwalk, Ohio.	"	May 1, '83.	6 mos. not.

Central Telephone Company, Chicago, Ill.	Springfield, Ill., to Beardstown, Ill.	113 C.	Jan. 29, '83.	Perpetual.
do.	Springfield, Ill., to Decatur, Ill.	"	Nov. 7, '82.	"
do.	Springfield, Ill., to Jacksonville, Ill.	"	Jan. 4, '83.	"
do.	Springfield, Ill., to Lincoln, Ill.	"	July 26, '82.	"
do.	Springfield, Ill., to Petersburgh, Ill.	"	June 21, '82.	"
do.	Springfield, Ill., to Taylorville, Ill.	"	June 21, '82.	"
do.	Streator, Ill., to Ottawa, Ill.	"	July 8, '83.	"
do.	Streator, Ill., to Pontiac, Ill.	"	June 2, '83.	"
do.	Terre Haute, Ind., to Sullivan, Ind.	"	Sep. 19, '82.	"
Chicago Telephone Co.	Chicago, Ill., to Milwaukee, Wis.	"	Apr. 4, '83.	"
do.	Chicago, Ill., to Michigan City, Ind.	"	June 16, '83.	6 mos. not.
do.	Geneva Lake, Wis., to Chicago, Ill.	"	June 14, '82.	6 mos. not.
City & Suburban Telegraph Association, The, Cincinnati, O.	Cincinnati, Ohio, to Dayton, Ohio.	"	Sep. 19, '82.	Perpetual.
do.	Cincinnati, Ohio, to Georgetown, Ohio.	"	June 2, '83.	6 mos. not.
do.	Cincinnati, Ohio, to Hillsborough, Ohio.	"	Nov. 27, '82.	Perpetual.
do. (See p. 40 [102].)	Cincinnati, Ohio, to Lebanon, Ohio.	"	Nov. 16, '82.	"
do.	Cincinnati, Ohio, to Louisville, Ky.	"	Sep. 4, '83.	May 1, '88, and thereafter, 6 mos. not.
do.	Cincinnati, Ohio, to Wilmington, Ohio.	"	Sep. 21, '83.	6 mos. not.
do.	Hamilton, Ohio, to Eaton, Ohio.	"	Nov. 21, '82.	Perpetual.
do.	Hamilton, Ohio, to Rushville, Ind.	"	Mch. 13, '83.	"
Cleveland Telephone Co., The, Cleveland, O.	Cleveland, Ohio, to Painesville, Ohio.	"	Apr. 2, '83.	Jan. 1, '88.
The Colorado Telephone Co.	State of Colorado, except between Denver and Leadville.	113 D.	Nov. 13, '83.	Perpetual.
Cozzens & Bull.	Newport, R. I., to Fall River, Mass.	113 C.	June 15, '81.	July, 1, '86.
Cumberland Telephone and Telegraph Co.	That portion of Tennessee west of Co's of Overton, Putnam, White, Warren, Coffee, Moore and Lincoln, except Co's of Shelby and Montgomery.	113 D.	July 29, '82.	Sep. 1, 87.

Cumberland Telephone and Telegraph Co.	Co's of Gallatin, Hardin, Massac, Pope, Saline, and White, *Ills.*; Crawford, Dubois, Gibson, Perry, Pike, Posey, Spencer, and Vanderburgh, and Warrick, *Indiana*; Daviess, Hancock, Henderson, Hopkins, McLean, Ohio, Union and Webster, *Kentucky*.	113 D.	Apr. 25, '82.	June 1, '86.
do.	Carnie to Harrisburgh, Ill.	113 C.	Nov. 23, '82.	June 1, '86.
do.	Evansville, Ind., to Madisonville, Ky.	"	Nov. 23, '82.	June 1, '86.
do.	Evansville, Ind., to Vincennes, Ind.	"	May 11, '82.	June 1, '87.
do.	Gallatin, Tenn., to Bowling Green, Ky.	"	Feb. 27, '83.	Sep. 1, '87.
do.	Gallatin, Tenn., to Dixon Springs, Ky.	"	Mch. 22, '83.	Sep. 1, '87.
do.	Lebanon, Tenn, to Alexandria, Tenn.	"	Apr. 26, '83.	Sep. 1, '87.
do.	Lebanon, Tenn., to Carthage, Tenn.	"	Apr. 26, '83.	Sep. 1, '87.
do.	Madisonville to Hopkinsville, Ky.	"	June 5, '82.	July 1, '87.
do.	Memphis, Tenn., to Holly Springs, Miss.	"	Jan. 9, '83.	Jan. 1, '88.
do.	Memphis, Tenn., to Jackson, Tenn.	"	Sep. 13, '83.	Sep. 1, '87.
do.	Memphis, Tenn., to Somerville, Tenn.	"	Sep. 13, '83.	Sep. 1, '87.
do.	Mt. Vernon, Ind. to Shawneetown, Ill.	"	Nov. 23, '82.	June 1, '86.
do.	Nashville, Tenn., to Hopkinsville, Ky.	"	Nov. 27, '82.	Sep. 1, 87.
do.	Poseyville, Ind., to Albion, Ill.	"	Oct. 24, '83.	6 mos. not.
do.	Princeton, Ind., to Petersburgh, Ind.	"	Nov. 23, '82.	June 1, 86.
East Tennessee Telephone Co. (See page 39 [102].)'	Co's of Coffee, Cumberland, Fentress, Franklin, Grundy, Lincoln, Moore, Overton, Putnam, Van Buren, Warren and White, *Tennessee*.	113 D.	July 29, '82.	Perpetual.
The Empire State Telephone and Telegraph Co.	Co's of Cayuga, Seneca, Wayne, Yates, Ontario, Oswego, and Cortland, *New York*.	"	Dec. 15, '81.	"
do.	Auburn to Ithaca, N. Y.	113 C.	Jan. 3, '84.	6 mos. not.
do.	Auburn to Syracuse, N. Y.	"	Aug. 1, '83.	6 mos. not.
do.	Canandaigua to Rochester, N. Y.	"	Apr. 16, '83.	6 mos. not.
do.	Cortland to Ithaca, N. Y.	"	Oct. 8, '83.	6 mos. not.
do.	Lyons to Rochester, N. Y.	"	Jan. 2, '84.	6 mos. not.
do.	Oswego to Syracuse, N. Y.	"	Dec. 19, '83.	6 mos. not.
do.	Penn Yan to Bath, N. Y.	"	Oct. 24, '83.	6 mos. not.
do.	do. to Watkins, N. Y.	"	Mar. 17, '84.	6 mos. not.
Freeport Telephone Exchange Co.	Freeport to Rockford, Ill.	"	June 16, '83.	6 mos. not.

Great Southern Telephone and Telegraph Co.	States of Louisiana and Mississippi, except on lines connecting Exchanges lying upon the most direct route between Holly Springs, Miss., and Memphis, Tenn., with each other or with the Exchange at Holly Springs, and except on lines connecting Exchanges lying upon the most direct route between Friar's Point, Miss. and Memphis, Tenn. with each other or with the Exchange at Friar's Point, Miss., said two last mentioned routes having been licensed to the Memphis Telephone & Electric Co. by licenses dated Jan. 9, '83, respectively.	113 D.	Oct. 1, '83.	Perpetual.
Hazard, R. G. 2d.	South Kensington, R. I., to Providence, R. I.	113 C.	Oct. 20, '81.	Nov. 1, '86.
Hudson River Telephone Co. (Iowa & Minnesota, vide p. 33 [99].)	Co's of Wayne and Pike, *Penn.;* Sussex, *N. J.;* Sullivan, Dutchess, Ulster, Orange, Rockland, West Chester and Putnam, *N. Y.;* except such parts of Orange, Rockland, and West Chester Co's as are within 33 miles from City Hall, N. Y. City and Township of South East in Putnam Co.	113 D.	Sep. 1, '83.	Perpetual.
Johnson, Lenson, Vincennes, Ind.	Greensburgh, Ind., to Shelbyville, Ind.	113 C.	Feb. 8, '83.	Oct. 1, '86.
do.	Seymour, Ind., to Columbus, Ind.	"	Jan. 29, '83.	June 1, '86.
do.	Shelbyville, Ind., to Columbus, Ind.	"	Jan. 29, '83.	Dec. 1, '86.
do.	Shelbyville, Ind., to Indianapolis, Ind.	"	May 1, '82.	May 1, '87.
do.	Vincennes, Ind., to Bloomfield, Ind.	"	Feb. 8, '82.	Mar. 1, '85.
do.	Vincennes, Ind., to Evansville, Ind.	"	May 11, '82.	June 1, '87.
do.	Vincennes, Ind., to Olney, Ill.	"	Apr. 25, '82.	May 1, '87.
do.	Vincennes, Ind., to Sullivan, Ind.	"	Aug. 13, '83.	6 mos. not.
do.	Vincennes, Ind., to Washington, Ind.	"	Apr. 25, '82.	May 1, '87.
do.	Washington, Ind., to Petersburgh, Ind.	"	Apr. 25, '82.	May 1, '87.
Leadville Telephone Company, The, Leadville, Col.	Denver, Col., to Leadville, Col.	"	Dec. 31, '80.	Jan. 1, '90.

Miami Telephone Company, The, Xenia, Ohio.	Xenia, Ohio, to Dayton, Ohio.	113 C.	Apr. 12, '82.	May 1, '87.
do.	Xenia, Ohio, to Lebanon, Ohio.	"	Nov. 1, '83.	May 1, '87.
do.	Xenia, Ohio, to Springfield, Ohio.	"	Apr. 26, '84.	6 mos. not.
Iowa Union Telephone and Telegraph Company.	Co's of Adair, Adams, Appanoose, Audubon, Benton, Black Hawk, Boone, Buchanan, Cass, Cedar, Clarke, Clinton, Dallas, Davis, Decatur, Des Moines, Fremont, Greene, Guthrie, Henry, Humboldt, Iowa, Jackson, Jasper, Jefferson, Johnson, Jones, Keokuk, Lee (excepting Townships of Montrose and Des Moines), Louisa, Lucas, Madison, Mahaska, Marion, Mills, Monroe, Montgomery, Muscatine, Page, Poweshiek, Ringold, Shelby, Story, Tama, Taylor, Union, Van Buren, Warren, Washington, Wayne and Webster, *Iowa*, and Carroll and Whitesides, *Ill.*	113 D.	Feb. 12, '84.	Perpetual.
do.	Anamosa to Cedar Rapids, Ia.	113 C.	Apr. 14, '82.	May 1, '87.
do.	De Witt to Davenport, Ia.	"	June 23, '82.	July 1, '87.
do.	Independence to Cedar Rapids.	"	May 15, '83.	6 mos. not.
do.	Indianola to Des Moines.	"	Apr. 14, '82.	May 1, '87.
do.	Iowa City to Davenport, Ia.	"	June 28, '83.	6 mos. not.
do.	Montezuma to Marshalltown, Ia.	"	May 28, '83.	6 mos. not.
do.	Morrison to Dixon, Ill.	"	Feb. 13, '83.	Mch. 1, '85.
do.	Mt. Carroll to Polo, Ill.	"	Feb. 13, '83.	July 1, '86.
do.	Muscatine to Davenport, Ia.	"	Aug. 16, '82.	Sep. 1, '87.
do.	Newton to Des Moines, Ia.	"	June 16, '83.	6 mos. not.
do.	Vinton to Cedar Rapids, Ia.	"	June 2, '83.	6 mos. not.
do.	Winterset to Des Moines, Ia.	"	Apr. 14, '82.	May 1, '87.
Michigan Bell Telephone Co.	State of Michigan.	113 D.	Apr. 30, '81.	Feb. 1, '91.
do.	Adrian, Mich., to Toledo, Ohio.	113 C.	Feb. 16, '83.	Jan. 1, '88.
do.	Detroit, Mich., to Toledo, Ohio.	"	Mch. 7, '82.	Feb. 1, '91.
do.	Niles, Mich., to South Bend, Ind.	"	May 8, '83.	6 mos. not.
Midland Telephone Co. Assignor to Central Union Telephone Co.	Counties of Adams, Allen, DeKalb, Elkhart, Huntington, Kosciusko, La Grange, Marshall, Noble, Steuben, Wabash, Wells and Whitley, *Indiana.*	113 D.	July 1, '82.	Perpetual.

Midland Telephone Company, Chicago, Ill.	Akron, Ohio, to Canton, Ohio.	113 C.	Mch. 15, '82.	Perpetual.
do.	Akron, Ohio, to Cleveland, Ohio.	"	Oct. 23, '82.	"
do.	Alliance, Ohio, to Canton, Ohio.	"	Jan. 9, '83.	"
do.	Ashtabula, Ohio, to Painesville, Ohio.	"	May 28, '83.	"
do.	Bellefontaine, Ohio, to Kenton, Ohio.	"	May 15, '83.	"
do.	Bellefontaine, Ohio, to Sidney, Ohio.	"	May 8, '83.	"
do.	Bellefontaine, Ohio, to Urbana, Ohio.	"	Aug. 14, '83.	"
do.	Bluffton, Ind., to Hartford City, Ind.	"	Mch. 2, '83.	"
do.	Chillicothe, Ohio, to Circleville, Ohio.	"	June 18, '81.	July 1, '86.
do.	Columbus, Ohio, to Circleville, Ohio.	"	Mch. 22, '83.	Perpetual.
do.	Columbus, Ohio, to Delaware, Ohio.	"	Mch. 22, '83.	"
do.	Columbus, Ohio, to Lancaster, Ohio.	"	July 19, '82.	"
do.	Columbus, Ohio, to Marysville, Ohio.	"	Oct. 4, '82.	"
do.	Columbus, Ohio, to Newark, Ohio.	"	Apr. 9, '83.	"
do.	Columbus, Ohio, to Sunbury, Ohio.	"	Sep. 28, '82.	"
do.	Dayton, Ohio, to Eaton, Ohio.	"	Jan. 21, '82.	"
do.	Dayton, Ohio, to Cincinnati, Ohio.	"	Sep. 19, '82.	"
do.	Dayton, Ohio, to Greenville, Ohio.	"	May 8, '83.	"
do.	Dayton, Ohio, to Springfield, Ohio.	"	Apr. 4, '82.	"
do.	Dayton, Ohio, to Xenia, Ohio.	"	Apr. 12, '82.	"
do.	Eaton, Ohio, to Hamilton, Ohio.	"	Nov. 21, '82.	
do.	Elkhart, Ind. to South Bend, Ind.	"	Feb. 8, '83.	"
do.	Fremont, Ohio, to Sandusky, Ohio.	"	Apr. 27, '83.	6 mos. not.
do.	Galion, Ohio, to Bucyrus, Ohio.	"	Jan. 16, '83.	Sep. 1, '86.
do.	Gallipolis, Ohio, to Pomroy, Ohio.	"	Mch. 27, '83.	Perpetual.
do.	Georgetown, Ohio, to Cincinnati, Ohio.	"	June 2, '83.	6 mos. not.
do.	Greenville, Ohio, to Richmond, Ind.	"	June 5, '82.	Perpetual.
do.	Hillsborough, Ohio, to Bainbridge, Ohio.	"	Apr. 26, '83.	"
do.	Hillsborough, Ohio, to Cincinnati, Ohio.	"	Nov. 27, '82.	"
do.	Kenton, Ohio, to Lima, Ohio.	"	June 21, '83.	"

idland Telephone Company, Chicago, Ill.	Lima, Ohio, to Middletown, Ohio.	113 C.	Feb. 23, '82.	Perpetual.
do.	Lima, Ohio, to Van Wert, Ohio.	"	May 8, '83.	"
do.	Mansfield, Ohio, to Ashland, Ohio.	"	Sep. 25, '82.	
do.	Mansfield, Ohio, to Galion, Ohio.	"	Mch. 2, '83.	"
do.	Mansfield, Ohio, to Norwalk, Ohio.	"	Apr. 2, '83.	"
do.	Mount Vernon, Ohio, to Mansfield, Ohio.	"	June 21, '83.	"
do.	Norwalk, Ohio, to Fremont, Ohio.	"	Apr. 2, '83.	"
do.	Norwalk, Ohio, to Sandusky, Ohio.	"	May 1, '83.	6 mos. not.
do.	Oberlin, Ohio, to Cleveland, Ohio.	"	May 1, '82.	May 1, '87.
do.	Painesville, Ohio, to Cleveland, Ohio.	"	April 2, '83.	Perpetual.
do.	Piqua, Ohio, to Greenville, Ohio.	"	Oct. 11, '82.	"
do.	Port Clinton, Ohio, to Fremont, Ohio.	"	May 28, '83.	"
do.	Portland, Ind., to Hartford City, Ind.	"	Mch. 17, '83.	"
do.	Portland, Ind., to Winchester, Ind.	"	May 1, '83.	"
do.	Portsmouth, Ohio, to Ironton, Ohio.	"	June 24, '86.	July 4, '86.
do.	Ravenna, Ohio, to Akron, Ohio.	"	Sep. 19, '82.	Perpetual.
do.	Ravenna, Ohio, to Cleveland, Ohio.	"	June 16, '83.	6 mos. not.
do.	Springfield, Ohio, to Columbus, Ohio.	"	Sep. 29, '82.	Perpetual.
do.	Springfield, Ohio, to Dayton, Ohio.	"	Apr. 13, '83.	"
do.	Springfield, Ohio, to Urbana, Ohio.	"	May 10, '82.	"
do.	Tiffin, Ohio, to Fremont, Ohio.	"	April 9, '83.	"
do.	Toledo, Ohio, to Adrian, Mich.	"	Mch. 5, '83.	"
do.	Toledo, Ohio, to Bowling Green, Ohio.	"	Apr. 9, '83.	"
do.	Toledo, Ohio, to Detroit, Mich.	"	Mch. 7, '82.	"
do.	Toledo, Ohio, to Fremont, Ohio.	"	Mch. 22, '83.	"
do.	Union City, Ind., to Greenville, Ohio.	"	Feb. 15, '83.	"
do.	Union City, Ind., to Hartford City, Ind.	"	June 19, '83.	6 mos. not.
do.	Urbana, Ohio, to Piqua, Ohio.	"	Mch. 22, '83.	Perpetual.
do.	Wabash, Ind., to Marion, Ind.	"	Aug. 25, '82.	"
do.	Wabash, Ind., to Peru, Ind.	"	Dec. 4, '82.	"
do.	Washington C. H., Ohio, to Circleville, Ohio.	"	June 21, '83.	"

Midland Telephone Company, Chicago, Ill.	Washington C. H., Ohio, to Wilmington, Ohio.	113 C.	Mch. 22, '83.	Perpetual.
do.	Wilmington, Ohio, to Hillsborough, Ohio.	"	Nov. 2, '82.	"
do.	Winchester, Ind., to Union City, Ind.	"	Apr. 2, '83.	"
do.	Wooster, Ohio, to Ashland, Ohio.	"	May 28, '83.	"
do.	Wooster, Ohio, to Massillon, Ohio.	"	Apr. 16, '83.	"
do.	Youngstown, Ohio, to Girard, Ohio.	"	Dec. 11, '82.	"
do.	Youngstown, Ohio, to Ravenna, Ohio.	"	June 16, '83.	"
do.	Youngstown, Ohio, to Sharon, Penn.	"	Jan. 16, '83.	"
Missouri & Kansas Telephone Co.	Co's of Adair, Andrew, Atchison, Audrian, Boone, Buchanan, Caldwell, Callaway, Carroll, Cass, Chariton, Clarke (excepting such portion as is within five miles from Keokuk, *Ia.*), Clay, Clinton, Cole, Cooper, Daviess, DeKalb, Gasconade, Gentry, Grundy, Harrison, Holt, Howard, Jackson, Johnson, Knox, La Fayette, Lewis, Linn, Livingston, Macon, Marion (excepting such portion as is within five miles from Quincy, *Ill.*). Mercer, Moniteau, Monroe, Montgomery, Nodaway, Osage, Pettis, Pike, Platte, Putnam, Ralls, Randolph, Ray, Saline, Schuyler, Scotland, Shelby, Sullivan and Worth in *Missouri;* and all that part of Adams and Pike Co's, *Illinois*, which is included within a radius of 15 miles from Hannibal, *Mo.*, except such part thereof as is within 5 miles from Quincy, *Ill.* (Atchison, Doniphan, Jefferson, Leavenworth, Shawnee and Wyandotte Co's, *Kansas*, added to this contract.)	113 D.	Jan. 4, '83.	Perpetual.
do.	Canton, Mo., to Monticello, Mo.	113 C.	June 16, '83.	"
do.	Canton, Mo., to Quincy, Ill.	"	Mch. 13, '83.	"
do.	Hannibal, Mo., to Pittsfield, Ill.	"	Apr. 18, '84.	6 mos. not.
do.	Hannibal, Mo., to Quincy, Ill.	"	Jan. 4, '83.	Perpetual.

Missouri & Kansas Telephone Co.	Kansas City, Mo., to St. Lawrence, Kan.	113 C.	Oct. 1, '83.	6 mos. not.
do.	St. Joseph, Mo., to Atchison, Kan.	"	Jan. 4, '83.	Perpetual.
do.	Topeka, Kan., to Lawrence, Kan.	"	Oct. 1, '83.	6 mos. not.
do.	Topeka, Kan., to Osage City, Kan.	"	Apr. 16, '84.	6 mos. not.
National Capital Telephone Co.	Washington, D. C., to Laurel, Md.	"	Mch. 31, '83.	Perpetual.
Nebraska Telephone Co.	Pottawattamie Co., Ia., and State of Nebraska, except Co's of Adams and Otoe.	113 D.	June 14, '83.	"
New England Telephone and Telegraph Co.	The States of Maine, New Hampshire, Vermont, and Massachusetts, *excepting in Mass.*, Co's of Barnstable, Nantucket, Dukes, and Bristol, and such portion of Plymouth Co. as is not included in town of Hingha ; except on lines connecting exchanges at Boston and Lowell, Mass., licensed to Pioneer Co. with each other or with the exchanges at Lowell and Boston; except on lines connecting exchanges established or which may be established upon the route between Boston, Mass., and Providence, R. I., licensed to Interstate Telephone Co., with each other or with the exchanges at Boston, Worcester, Mass., and Providence, R.I., licensed to Interstate Telephone Co. with each other or with exchange at Worcester; Springfield, Mass. and Hartford, Conn., licensed to Interstate Telephone Co. with each other or with exchange at Springfield; Milton, and Brockton, Mass., licensed to Southern Massachusetts Telephone Co. with each other or with exchange at Milton. Boston and Lowell lines are added to this agreement.	"	Nov. 2, '83.	"
do.	Milford, Mass., to Providence, R. I.	113 C.	Nov. 2, '83.	"

New York and Pennsylvania Telephone and Telegraph Co.	Co's of Bradford, McKean, Potter, Susquehanna, Tioga and Warren, and so much of Co. of Erie as is within 10 miles of Court House in Corry, *Penn.*; Co's of Allegheny, Broome, Cattaraugus, Chautauqua, Chemung, Schuyler, Steuben, Tioga, and Tompkins, *New York*.	113 D.	Mch. 10, '83.	Perpetual.
	Rest of Erie Co., *Pa.*, added.			
do.	Bath, N. Y., to Penn Yan, N. Y.	113 C.	Oct. 24, '83.	6 mos. not.
do.	Binghamton to Norwich, N. Y.	"	Oct. 24, '83.	6 mos. not.
do.	Erie to Meadville.	"	Oct. 31, '83.	6 mos. not.
do.	Ithaca to Auburn, N. Y.	"	Jan. 3, '84.	6 mos. not.
do.	Ithaca to Cortland, N. Y.	"	Oct. 8, '83.	6 mos. not.
do.	Watkins to Penn Yan, N. Y.	"	Mar. 17, '84.	6 mos. not.
North Pennsylvania Telephone Co.	Counties of Lackawanna, Luzerne & Wyoming, Pennsylvania.	113 D.	Mar. 6, '83.	Perpetual.
do.	Wilkesbarre to Bloomsburg, Pa.	113 C.	July 13, '83.	6 mos. not.
The Northwestern Telephone Exchange Co.	Faribault to Mankato, Minn.	"	Dec. 11, '83.	Jan. 1, '87.
do.	Minneapolis to Faribault, Minn.	"	Dec. 11, '83.	Jan. 1, '87.
do.	Minneapolis to Minnetrista, Minn.	"	June 3, '81.	June 1, '87.
do.	Minneapolis to St. Cloud, Minn.	"	Dec. 4, '83.	Jan. 1, '87.
do.	St. Paul to Stillwater, Minn.	"	Feb. 27, '80.	Apr. 1, '85.
do.	St. Paul to Winona, Minn.	"	Apr. 9, '83.	Jan. 1, '86.
Ohio Valley Telephone Co.	Co's of Clark and Floyd, *Indiana*; Co's of Breckenridge, Bullitt, Grayson, Hardin, Jefferson, La Rue, Meade, Nelson, Oldham, Shelby and Spencer, *Kentucky*.	113 D.	July 18, '83.	Perpetual.
do.	Louisville, Ky., to Cincinnati, Ohio.	113 C.	Sep. 4, '83.	May 1, '88, and thereafter 6 mos. notice.
do.	Louisville, Ky., to Madison, Ind.	"	Sep. 20, '83.	May 1, '88, and thereafter 6 mos. notice.
do.	Louisville, Ky., to Lebanon, Ky.	"	Sep. 8, '83.	May 1, '88, and thereafter 6 mos. notice.
do.	New Albany to Leavenworth, Ind.	"	Jan. 13, '83.	Mar. 18, '89.
do.	Shelbyville to Frankfort, Ky.	"	Jan. 13, '83.	Mar. 18, '89.

The Pennsylvania Telephone Co.	Counties of Adams, Berks, Carbon, Cumberland, Dauphin, Franklin, Fulton, Lancaster, Lebanon, Lehigh, Monroe, Northampton, Perry, Schuylkill and York (excepting such part of York Co. as is within 5 miles from Hanover, Pa.). *Penn.*, and Warren Co., *N. J.* Part of York Co., *Penn.*, and part of Hunterdon Co., *N. J.*, added.	113 D.	Jan. 1, '83.	Perpetual.
do.	Mauch Chunk to Hazleton, Pa.	113 C.	Jan. 1, '83.	May 1, '87.
do.	Pottsville to Shamokin, Pa.	"	July 18, '83.	6 mos. not.
do.	Reading to Pottstown, Pa.	"	Jan. 1, '83.	Nov. 1, '86.
Providence Telephone Co.	Providence, R. I., to Milford, Mass	"	Feb. 9, '83.	Jan. 1, '83.
do.	Providence, R. I., to Pascoag, R. I.	"	Nov. 21, '81.	Dec. 1, '86.
do.	Providence, R. I., to Warren, R. I.	113 B.	Aug. 3, '80.	Sep. 1, '85.
do.	Providence, R. I., to So. Kingston, R. I.	113 C.	Oct. 20, '81.	Nov. 1, '86.
Rocky Mountain Bell Telephone Co.	Territories of Idaho, Montana, Wyoming and Utah (except such portion of territory of Utah lying west of the 35° longitude as is not comprehended within a radius of 5 miles from the cities of Salt Lake City and Ogden).	113 D.	Aug. 1, '83.	Perpetual.
The Southern Massachusetts Telephone Co.	Towns of Tiverton and Little Compton, *R. I.*; Co's of Plymouth, Bristol, Barnstable, Dukes and Nantucket, *Mass.*; except towns of Hingham, Attleboro, Seekonk and Rehoboth, Mass.	"	Oct. 21, '81.	"
do.	Brockton to Boston, Mass.	113 C.	Mch. 24, '83.	"
do.	Fall River to Newport, R. I.	"	Oct. 21, '81.	"
do.	Fall River, Mass., to Warren, R. I.	"	Oct. 21, '81.	"
do.	Taunton, Mass., to Brockton, Mass.	"	Oct. 21, '81.	"
The Southern New England Telephone Co.	New Haven to Derby, Conn.	"	Nov. 7, '80.	Jan. 1, '85.
do.	Meriden to Middletown, Conn.	"	Jan. 14, '81.	May 1, '86.
do.	New London to Norwich, Conn.	"	May 20, '80.	June 1, '85.
(See pp. 40-41 [pp. 102-103 of this Record].)				
The Southwestern Telegraph and Telephone Co.	States of Texas and Arkansas.	113 D.	Mch. 1, '81.	June 1, '91.

The Southwestern Telegraph and Telephone Co.	Dallas to Denton, Texas.	113 C.	Nov. 12, '83.	June 1, '91.
do.	San Antonio to Eagle Pass, Texas.	"	Nov. 12, '83.	June 1, '91.
Sullivan Telephone Exchange Co.	Sullivan to Terre Haute, Ind.	"	Sept. 19, '82.	Oct. 1, '87.
do.	Sullivan to Vincennes, Ind.	"	Aug. 13, '83.	6 mos. not.
United Telephone Co.	State of *Kansas* (excepting Co.'s of Atchison, Doniphan, Jefferson, Leavenworth, Shawnee and Wyandotte), *Indian Territory*, and Co.'s of Barry, Barton, Bates, Benton, Camden, Cedar, Christian, Dade, Dallas, Douglas, Greene, Henry, Hickory, Jasper, Laclede, Lawrence, McDonald, Morgan, Newton, Ozark, Polk, St. Clair, Stone, Taney, Vernon, Webster and Wright, *Missouri*.	113 D.	May 11, '83.	Perpetual.
do.	Lawrence to Topeka, Kan.	"	Oct. 1, '83.	6 mos. not.
do.	Lawrence to Kansas City, Mo.	"	Oct. 1, '83.	6 mos. not.
do.	Osage City to Topeka, Kan.	"	Apr. 16, '84.	6 mos. not.
Iowa and Minnesota Telephone Co. (See p. 17 [91].)	Manchester to Dubuque, Ia.	"	Sep. 5, '82.	Sep. 15, '86.
do.	Le Mars to Sioux City, Ia.	"	Jan. 12, '83.	Sep. 15, '86.
do.	Marshalltown to Montezuma, Ia.	"	May 28, '83.	6 mos. not.
do.	Waverly to Allison, Ia.	"	Aug. 10, '83.	Sep. 15 '86.
Central Telephone Co.	Peoria to Lincoln, Ill.	"	Nov. 23, '82.	Dec. 1, '87.
do.	Peoria to Galesburgh, Ill.	"	Nov. 23, '82.	Dec. 1, '87.
do.	Peoria to Canton, Ill.	"	Nov. 23, '82.	Dec. 1, '87.
do.	Peoria to Bloomington, Ill.	"	Nov. 23, '82.	Dec. 1, '87.
Western Telephone Company, Chicago, Ill.	Cedar Rapids, Ia., to Anamosa, Ia.	"	Apr. 14, '82.	Perpetual.
do.	Cedar Rapids, Ia., to Independence, Ia.	"	May 15, '83.	6 mos. not.
do.	Cedar Rapids, Ia., to Vinton, Ia.	"	June 2, '83.	6 mos. not.
do.	Davenport, Ia., to De Will, Ia.	"	June 23, '82.	Perpetual.
do.	Davenport, Ia., to Dixon, Ia.	"	May 28, '83.	"
do.	Davenport, Ia., to Geneseo, Ill.	"	May 17, '82.	"
do.	Davenport, Ia., to Iowa City, Ia	"	June 8, '83.	6 mos. not.
do.	Davenport, Ia., to Muscatine, Ia.	"	Aug. 16, '82.	Perpetual.
do.	Des Moines, Ia., to Indianola, Ia.	"	Apr. 14, '82.	"

Western Telephone Company, Chicago, Ill.	Des Moines, Ia., to Newton, Ia.	113 C.	June 16, '83.	6 mos. not.
do.	Des Moines, Ia., to Winterset, Ia.	"	Apr. 14, '82.	Perpetual.
do.	Dubuque, Ia., to Cascade, Ia.	"	June 2, '83.	"
do.	Dubuque, Ia., to Galena, Ill.	"	Aug. 21, '82.	"
do.	Dubuque, Ia., to Manchester, Ia.	"	Sep. 5, '82.	"
do.	Dubuque, Ia., to Platteville, Wis.	"	Feb. 23, '83.	"
do.	Indianapolis, Ind., to Anderson, Ind.	"	July 19, '82.	"
do.	Indianapolis, Ind., to Franklin, Ind.	"	Apr. 22, '82.	"
do.	Indianapolis, Ind., to Greencastle, Ind.	"	Apr. 25, '82.	"
do.	Indianapolis, Ind., to Lebanon, Ind., via Eagle Village.	"	July 19, '82.	"
do.	Indianapolis, Ind., to Martinsville, Ind.	"	July 19, '82.	"
do.	Indianapolis, Ind., to Noblesville, Ind., via Castleton.	"	July 8, '82.	"
do.	Indianapolis, Ind., to Noblesville, Ind., via Nora.	"	Sep. 1, '82.	"
do.	Indianapolis, Ind., to Rushville, Ind.	"	Mch. 8, '83.	"
do.	Indianapolis, Ind., to Shelbyville, Ind.	"	May 1, '82.	"
do.	Keokuk, Ia., to Carthage, Ill.	"	Apr. 27, '83.	6 mos. not.
do.	Kokomo, Ind., to Frankfort, Ind.	"	Sep. 6, '82.	Perpetual.
do.	Kokomo, Ind., to Noblesville, Ind.	"	Jan. 4, '83.	"
do.	LaFayette, Ind., to Delphi, Ind.	"	June 7, '83.	6 mos. not.
do.	La Fayette, Ind., to Fowler, Ind.	"	Oct. 17, '82.	Perpetual.
do.	La Fayette, Ind., to Frankfort, Ind.	"	Apr. 15, '82.	"
do.	La Salle, Ill., to Mendota, Ill.	"	Mch. 27, '82.	"
do.	La Salle, Ill., to Princeton, Ill.	"	Mch. 27, '82.	"
do.	Logansport, Ind., to Delphi, Ind.	"	May 1, '83.	6 mos. not.
do.	Logansport, Ind., to Kokomo, Ind.,	"	Feb. 8, '83.	Perpetual.
do.	Logansport, Ind., to Monticello, Ind.	"	Mch. 17, '83.	"
do.	Marion, Ind., to Anderson, Ind.	"	Dec. 11, '82.	"
do.	Marion, Ind., to Hartford, City, Ind.	"	July 6, '82.	"
do.	Marion, Ind., to Kokomo, Ind.	"	June 19, '83.	"

Western Telephone Company, Chicago, Ill.	Marion, Ind., to Wabash, Ind.	113 C.	Aug. 25, '82.	Perpetual.
do.	Ottawa, Ill., to Streator, Ill.	"	July 8, '82.	"
do.	Peru, Ill., to Joliet, Ill.	"	Apr. 18, '82.	"
do.	Peru, Ind., to Kokomo, Ind.	"	Aug. 24, '82.	"
do.	Peru, Ind., to Logansport, Ind.	"	Mar. 29, '82.	"
do.	Peru, Ind., to Marion, Ind.	"	June 15, '82.	"
do.	Peru, Ind., to Wabash, Ind.	"	Dec. 4, '82.	"
do.	Quincy, Ill., to Canton, Mo.	"	Mar. 13, '83.	"
do.	Quincy, Ill., to Hannibal, Mo.	"	Aug. 2, '82.	"
do.	Quincy, Ill., to Mt. Sterling, Ill.	"	Feb. 8, '83.	"
do.	Rockford, Ill., to Polo. Ill.	"	Jan. 13, '83.	"
do.	Rockford, Ill., to Beloit, Wis.	"	Feb. 21, '83.	"
do.	Rockford, Ill., to Belvidere, Ill.	"	Mar. 5, '83.	"
do.	Rockford, Ill., to Freeport, Ill.	"	June 16, '83.	6 mos. not.
do.	South Bend, Ind., to Elkhart, Ind.	"	Feb. 8, '83.	Perpetual.
do.	South Bend, Ind., to Niles, Mich.	"	May 8, '83.	6 mos. not.
do.	Indianapolis, Ind., to Lebanon, Ind., via Zionsville.	"	Jan. 12, '83.	Perpetual.
Wisconsin Telephone Co.	State of Wisconsin (excepting Counties of Burnett, Douglas, Pierce, Polk and St. Croix and excepting also so much of the counties of Grant and Crawford as lie within 15 miles from Central Office in McGregor, *Iowa*;) except on lines connecting exchanges between Kenosha and Chicago with each other or with the exchange at Kenosha, and, except on lines connecting exchanges between Geneva Lake and Chicago with each other or with the exchange at Geneva Lake.	113 D.	Aug. 10, '82.	"
do.	Beloit, Wis., to Rockford, Ill.	113 C.	Feb. 21, '83.	"
do.	Platteville, Wis., to Dubuque, Ia.	"	Feb. 23, '83.	"

East Tennessee Telephone Co. (See page 15 [90].)	Co's of Anderson, Bledsoe, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Grainger, Greene, Hamblen, Hamilton, Hancock, Hawkins, James, Jefferson, Johnson, Knox, Loudon, Marion, McMinn, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sequatchie, Sevier, Sullivan, Union and Washington, *Tennessee.*	113 D.	June 21, '81.	Perpetual.
do.	Co's Allen, Barren, Bullet, Edmonson, Green, Hart, Logan, Metcalfe, Monroe, Simpson and Warren, *Kentucky.*	"	June 21, '81.	"
do.	Co's of Anderson, Bath, Bourbon, Bracken, Clark, Fayette, Fleming, Franklin, Harrison, Jessamine, Lewis, Mason, Menifee, Montgomery, Nicholas, Robertson, Rowan Scott and Woodford, *Kentucky.*	"	June 21, '81.	"
do.	Co's of Ballard, Calloway, Fulton, Graves, Hickman, Marshall and McCracken, *Kentucky.*	"	June 21, '81.	"
The City and Suburban Telegraph Association. (See page 13 [89].)	Co's of Hamilton, Clermont, Butler and Warren, *Ohio;* Co's of Boone, Kenton, Campbell, Pendleton, Grant and Gallatin, *Kentucky;* and Co's of Franklin, Dearborn, Ohio and Switzerland, *Indiana;* except right to connect Lebanon, Middletown and Hamilton, *Ohio.*	"	May 1, '82.	"
The Southern New England Telephone Co. (see page 32 [page 89 of this record]), Assignee of Inter-State Telephone Co.	*a.* From such point within the limits of the Exchange District of Boston as the lessor shall designate to be connected by the lessor or its licensees with the lines of the lessor or its licensees, which said lines shall connect with the Exchange system of said city to such point within the Exchange District of New York City as the lessor shall designate to be con-			

	nected by the lessor or its licensees with the lines of the lessor or its licensees, which said line shall connect with the Exchange system of said city of New York by a route passing through the cities of Providence in the State of Rhode Island, and New London, New Haven and Bridgeport in the State of Connecticut, which route shall be direct between said successive places. *b.* From the City of Springfield, in the State of Massachusetts, to the City of New Haven, in the State of Connecticut, upon the route passing through Hartford and Meriden in said State of Connecticut, which route shall be direct between said successive places. *c.* From the City of Providence, in the State of Rhode Island, to the City of Bridgeport, in the State of Connecticut, by a route passing through Hartford and Waterbury, in the State of Connecticut, and towns on the line of the Naugatuck Valley R. R., and which route shall be direct between said successive places. *d.* From the City of Worcester, in the State of Massachusetts, to the City of Providence, in the State of Rhode Island, by a direct route.	113 B.	July 14, '80.	July 1, '87.
Central District and Printing Telegraph Co.	Allegheny, Butler, Armstrong, Westmoreland, Washington, Fayette, Green, Beaver, Lawrence, Mercer, Clarion, Jefferson, Cambria, Somerset, Bedford, Crawford, Elk, Forest, Venango, and Indiana, Counties in *Pennsylvania;* Belmont, Harrison, Morgan, Washing-			

	ton, Monroe, Noble, Guernsey, Carroll, Tuscarawas, Trumbull, Jefferson, and Columbiana, Counties in *Ohio*; Brooke, Marshall, Wood, Harrison, Wetzel, Monongalia, Marion, Taylor, Tylor, Doddridge, Pleasants, Ohio, Preston, Tucker, Barbour, Ritchie, Wirt, and Hancock, Counties in *West Virginia*.	Written.	Nov. 28, '79.	10 years from Aug. 23, '79, with right of extension for 90 years.

The Commercial Telephone Company of Albany has built certain lines under an agreement for licenses in the above-named forms.

NOTE. The Michigan Bell Telephone Company holds no Exchange Licenses from The American Bell Telephone Company. All other persons, or Companies, named in the above list are holders of Exchange Licenses from said American Bell.

The licenses in the above list designated as "perpetual" are made in pursuance of agreements scheduled in Schedule "A"; except that to the National Capital Telephone Co. and the line from Chicago, Ill., to Milwaukee, Wis., granted to the Chicago Telephone Co.

(10) EXHIBIT X OF DEFENDANT'S ANSWER.

[FILED MAY 23, 1890.]

CONTRACT FOR EXCHANGES.

Form 109 C.

THIS AGREEMENT, made this day of A. D. 18 , by and between the AMERICAN BELL TELEPHONE COMPANY, a corporation created under the laws of the State of Massachusetts, Lessor and Licensor, party of the first part, and .....

.....

.....

Lessee and Licensee (hereinafter called the "Exchange"), party of the second part, WITNESSETH:

(1.) *Whereas*, the Lessor owns the Letters Patent of the United States granted to Alexander Graham Bell, March 7, 1876, and January 30, 1877, numbered 174,465, 186,787, respectively, and owns or has the right to use, and may hereafter own or have the right to use, sundry other inventions, which are or may be embodied in electric speaking telephones, and desires to extend the use of telephones licensed by it in every manner in which the public may wish to use the same, and for that purpose to provide for the construction and use of the apparatus and lines necessary to be used in connection therewith; and whereas the Lessee desires to obtain the use of telephones under lease and license from the party of the first part to be used with the lines of a telephonic district or exchange system established and owned by it in the territory hereinafter described under the provisions hereinafter set forth: now it is agreed as follows: —

(2.) The rights hereby granted shall remain in force until the first day of A. D. 18 , unless sooner determined as hereinafter provided, and shall extend to all Exchanges established and owned by the Licensee within the present municipal limits of

.....

but this contract shall not take effect unless the second party shall tablish an exchange within months from the date hereof.

(3.) For the purpose of this contract, a telephonic exchange system means a system, entirely within said territory, in which different circuits are connected with a central or branch office of the Exchange, attended by an agent of the Exchange, for the purpose of placing subscribers or other parties by such circuits in telephonic communication with such central or branch exchange office, or with each other, either directly or through the agents of the system. No office or line of an Exchange can be connected with any point outside of said territory, nor with any telegraph company's office or line, except by lines of the Licensor or parties specially designated by it for this purpose, and no telegraph company, unless specially permitted by the Licensor, can be a subscriber or use the system to collect and deliver messages from and to its customers.

(4.) The Licensor, at its general office or factory, will deliver to the Exchange, as needed, electric speaking telephones, made and to be used under its patents, during the existence of the rights hereby granted and as herein set forth and permitted, and all telephones delivered to the Exchange during the continuance hereof shall be deemed to be furnished hereunder unless otherwise specially designated by the Licensor. They will be of such character and pattern and bear such marks as the Lessor shall from time to time determine, but the Exchange may choose from among such standard patterns. Each of said telephones shall remain the property of the Licensor, and is hereby leased, and the use of it licensed under said patents and all others under which the Lessor has or may have a right to license, so far as applicable thereto, for the purposes herein declared for the term of one year from the day when rent and royalty begin to accrue on it as provided in Article 8, but the due payment thereof to the Licensor, and the due performance of the stipulations hereof during said year, by the Exchange and those using the telephone under it shall *ipso facto* operate to renew the lease and license for another year, and so on until the expiration or other determination hereof; in no case, however, beyond the term defined by Article 2. The Exchange is hereby licensed to use said telephones for any purpose, upon circuits exclusively composed of the lines of any such exchange system, and to use them in connection with the trunk lines reserved to the Licensor by Article 9, for the purposes and to the

extent therein limited, during the term hereby created, upon condition and so long as the rental therefor shall be duly paid to the Licensor and as the provisions hereof are not violated, but not longer or otherwise; and it may grant said right to its customers by contracts as provided in Article 7. The Lessor will not license any telephones to be used by others upon an exchange system within said territory while the rights of the Exchange hereunder exist; but the Exchange shall, by general or special exchanges supply (so far as it is authorized so to do by this contract) all reasonable demands of the public, and shall be diligent to increase the number of telephones used on its exchanges. All rights not hereby specifically granted remain to the Licensor.

(5.) The Lessor will license, to be used with such telephones, the inventions in call-bells, switches, switch-boards, and other apparatus needed for such telephone lines, which it can so license, upon such royalties as it may from time to time estsblish, not greater than those fixed for others under similar circumstances; but such call-bells, switches, switch-boards and other apparatus shall be used only with telephones licensed by the Lessor, and the Exchange agrees not to use them otherwise nor to dispose of them to any one except those so licensed, or to the licensed manufacturers of the Lessor. The Exchange may enjoy any rights of way and similar franchises to maintain said lines which the Lessor can permit it to use, when and so long as, in the judgment of the Lessor, it shall not interfere with the Lessor's enjoyment thereof, and shall pay whatever may be due to third persons, if anything, growing out of or in connection with such use by it. For trunk lines from the exchange offices to extra-territorial points and to telegraph offices, the Lessor may, without further compensation, enjoy all rights of the Licensee to erect and maintain lines, and may use its poles and fixtures, but shall pay a *pro rata* share of the cost of erecting and maintaining them.

(6.) The Lessee admits the validity of all patents relating to telephony and telephonic appliances now or hereafter held by the Licensor or under which it may hold licenses exclusive in their character, and the validity of its title thereto, and will not dispute the same, nor make, use, or be interested in any telephones or telephonic lines or business not licensed by the Licensor or its assigns.

(7.) The contract between the Exchange and those who are to use telephones under it shall express in such form as the Lessor shall from time to time approve, that the telephone is the property of the Licensor; that it is leased and licensed by it only as herein expressed; that all use of it otherwise is an injury to and invasion of the rights of the Licensor as owner thereof and of the patent rights used therein and thereby, entitling it to all the remedies herein provided and to an injunction, and other legal redress, in a suit by it in its name and behalf. The Exchange shall require every person using said telephones for communications or messages sent or to be sent over other telephone or telegraph lines, to provide for payment of tolls thereon, and to make every such message subject to such stipulations, regulations, and conditions respecting the liability of such lines for errors and mistakes as the Licensor may from time to time require, and for that purpose will incorporate into its subscription contracts and message blanks such provisions and contracts, to be agreed to by the subscriber and customer, as the Licensor may from time to time approve, and will hold the Lessor harmless from all loss and expense consequent upon its failure so to do.

(8.) The Exchange shall charge its subscribers such rental and royalty for the telephones as the Licensor may fix from time to time, for this and other like exchanges, and also in addition a sum not exorbitant nor unusual for the use of call-bells, batteries, wires, and other appliances, and for services furnished or performed, and may collect both of said sums for a period not exceeding one year in advance. It will make such reports, giving such information regarding the operations of the Exchange and the prices charged as the Licensor may from time to time request. It shall pay to the Licensor a rental and royalty at the rate per instrument of per cent. of the telephone rental and royalty fixed as above (being a discount of per cent.) to commence on each telephone on the first day of the second calendar month after its shipment by the Licensor, to continue until the instrument shall be put into the possession of the Licensor, or proved to be destroyed, and to be paid in equal monthly payments in advance at the Licensor's office, on the tenth day of each month up to the last day of the same month. Until otherwise fixed the rates shall be as follows: —

Battery transmitter, each instrument . .	per year, $10
Magneto-telephone, each instrument . .	" $10

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Upon each instrument unlawfully detained from the Lessor, the Exchange shall pay ten dollars per month until satisfactory proof of its destruction be furnished; shall pay five dollars for each lost or destroyed otherwise than by fire or inevitable accident, and shall pay the expense of ordinary repairs; but said payments shall not confer any right to the instrument, nor to its use, nor satisfy any other breach of covenant, nor impair the right of the Licensor to obtain possession of any instrument or lines.

(9.) The Licensor may enter the offices and connect with the exchange system any lines to extra-territorial points, and to telegraph offices, in order to establish communication between customers of the Exchange and telegraph companies or parties reached by said lines, and may there operate said lines with suitable appliances; the Exchange will permit and encourage its customers to use such lines, and by its own operators will receive and transmit such messages to and from its customers and subscribers, or make the proper switch-board or other connections for direct communication, as may be requested, and in such manner, not inconsistent with the proper conduct of its office, as the Licensor shall direct. But if the Licensor is not satisfied with the manner in which it is performed, it may establish its own offices and trunk and radiating lines for this purpose. The Exchange will not, without special leave of the Licensor, so far as it can lawfully prevent it, permit the transmission over such connecting lines of general business messages, market quotations, or news for sale or publication, nor any communications in behalf of other parties than those who directly communicate by the telephone by themselves or their servants or agents personally present at the instruments, and no person engaged in the business of transmitting messages for other parties shall be authorized or knowingly allowed by the Exchange to transmit such messages over such lines. The Exchange will turn over and deliver to the Licensor and such parties as it may from time to time appoint,

exclusively, all messages for electrical transmission to points outside said territory collected by or coming on the wires or within the control of said Exchange, where the Licensor or such party has wires and will transmit the same, so far as the Exchange can lawfully control the same, and unless otherwise specially directed by its customers; but will not solicit such special directions, nor receive and pay tolls for transmission over other lines, unless compellable by law so to do. It shall keep and furnish an account of each such message transmitted or received, and of connections made therefor, and shall collect and on demand pay over to the Licensor or its said appointees, respectively, the tolls for transmission beyond the exchange system, according to such rates and rules as each shall establish, and shall exhibit its accounts and the tickets from which they are made, so far as may be proper to verify the same. The Exchange will, if and when so requested by the Licensor, make proper switch-board or other connection between the extra-territorial lines of the licensor or its Licensees terminating in the exchange office, for the purpose thereby of making up a through line between points without said exchange district. In respect of all the business provided for by this section, the Exchange shall make no charge to its own subscriber or customer, but shall make the following charges and none others: the Lessee shall receive upon communications originating within the Exchange and passing over the lines of the Exchange and the extra-territorial lines by direct connection, fifteen per cent. of the gross tolls on the extra-territorial line not to exceed five cents for any one message or communication occupying not more than five minutes: in case the Exchange shall be required to make a switch-board connection for the purpose of making up a through line between points without said exchange district, then the Exchange shall receive as compensation for making such connection, such share of the through toll (terminal expenses being first deducted) as may be agreed upon, not however a greater share thereof than ten miles is of the whole length of the through line so made up, and not in any event to exceed five cents for any one communication occupying not more than five minutes: upon messages collected by the Exchange over its lines or otherwise and forwarded by telegraph, the Exchange shall receive twenty-five per

cent. of the commission paid to the Lessor by the telegraph company, and the whole of the compensation for messenger service paid by the telegraph company: for delivering telegraph messages by telephone to subscribers, the Exchange may have free use of the Lessor's line to the telegraph office, when such use does not interfere with the proper despatch of outgoing business, and may receive from the telegraph company the whole of such compensation as it and the telegraph company may agree upon: for messages delivered by messenger for the telegraph company, it may receive the whole compensation. The Licensor now appoints the Western Union Telegraph Company to perform all telegraphic transmission under this article.

(10.) If the Exchange shall fail to pay any sums due hereunder for thirty days after the same shall become payable, or shall violate any other terms or conditions of this contract, and shall persist in such default, violation, or neglect, or fail to remedy or repair the same for sixty days after written notice thereof from the Licensor, or shall become bankrupt or insolvent, the Licensor may, if it shall so elect, by a written notice to the Exchange (or those in charge of its principal office), terminate all rights granted by the Licensor hereunder, and thereupon may by its agents sever the circuit on which any telephone is placed, and take possession of and remove the telephone, and for that purpose may enter the premises of the Exchange and all persons claiming under it; or it may collect, from any sub-lessee or subscriber, all sums then or thereafter due to it or to the Exchange for the use of any instruments, circuits, and appliances, or under any subscription contract; or it may, so long as it shall see fit, leave in the enjoyment and use of the telephones any subscriber or other person in actual possession, and collect from him such sums as may then and thereafter be or become due for the use of the telephone and exchange lines, appliances, and services, and for that purpose shall be entitled to and may take possession of all the lines, fixtures, apparatus, appliances, and premises of the Exchange used for carrying on its business, and occupy and operate the same in connection with said telephones and those of additional customers as an exchange, or connect such lines with an office of its own for that purpose; the Licensor shall have the like right upon

and within three months after the termination of the rights of the Exchange hereunder by efflux of time or otherwise; and may enforce these provisions by an entry, without being deemed guilty of any trespass, or by legal process, including an injunction to prevent any interference with the Licensor (and others permitted by it) in the use of said telephones, lines, switch-boards, and appliances. The property so taken, and which does not belong to the Lessor or revert to it hereunder, may be returned within three months from the taking, in which case it shall pay to the Exchange a reasonable compensation for its use, or the Lessor may retain the same as its own property and shall pay therefor a reasonable price (not exceeding the actual cost) within four months after the taking, and shall account to the Exchange for all sums collected which accrued before the Licensor became so entitled to possession, deducting all expenses incident thereto, and all that may be due to it. The Lessor also reserves all its rights and remedies in law and in equity, under the patent laws or otherwise, including the remedy by injunction against the Exchange or those claiming under it, for the use of any of its patented inventions or instruments not justified by a subsisting license hereunder, or for the violation of any other of its rights. If several exchange systems are established hereunder, these rights and remedies of the Lessor shall, in case of any default, apply to all such systems or to one alone at its option. The Lessor may also use the name of the Exchange to protect its interests and to enforce its rights hereunder, and the Exchange shall execute assignments in accordance herewith.

(11.) This contract is personal to the second party herein named, and any assignment or attempt to assign it, or the rights granted or lines established hereunder, by act of the party or operation of law, without the written consent of the Licensor, will be a violation hereof, and good ground for a cancellation hereof by the Licensor; but consent shall be given to an assignment by said party, or by executors or administrators, to any party who in the opinion of the Licensor is fitted and suitable to carry on the business, and who shall in writing become bound by the terms hereof. The part of the second part promise that he will keep and observe all the stipulations herein contained on part to be

kept and performed. Whenever the Licensor grants to others the rights for connecting lines or any other rights remaining to it, the stipulations hereof relating thereto shall be binding upon and enure to the benefit of such grantees, and the Licensor shall not be responsible for their acts or defaults. If the Licensor shall transfer to any party who shall agree to perform the stipulations hereof its title to the telephones hereby leased and the patent rights under which they are licensed, and its then existing interests hereunder, it is agreed that the provisions hereof enure to the benefit of and are binding upon such party in respect of all things done or to be done after such assignment, as if it were named a party hereto, and this said American Bell Telephone Company shall no longer be responsible hereunder.

The Licensee also agrees that it will not allow any telegraph company to use or to have any rights, on poles or other structures leased or put up by, or belonging to or under the control of said Licensee, without the written assent of the said American Bell Telephone Company.

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'(11) **EXHIBIT Y OF DEFENDANT'S ANSWER.**

[FILED MAY 23, 1890.]

CONTRACT FOR EXTRA-TERRITORIAL CONNECTING LINES.

Form 113 C.

THIS AGREEMENT, made this day of A. D. 188 , by and between the AMERICAN BELL TELEPHONE COMPANY, a corporation duly formed under the laws of Massachusetts, Lessor and Licensor, of the first part, and .....

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Lessee and Licensee, of the second part witnesseth:

1. Said Licensee desires to obtain the right to use upon lines between in the State of

and in the State of upon the route passing through .....

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telephones to be obtained from the Lessor and under lease and license from it, under its two patents granted Alexander Graham Bell, No. 174,465, dated March 7, 1876, and 186,787, dated January 30, 1877, and under other patents which it may hereafter own or have the right to use, applicable thereto; and also to avail itself of and enjoy the right of connecting with the exchange systems already established in any of said places, as provided and stipulated in favor of the Lessor in its exchange contracts for those places (copies of which stipulations have been furnished to the Licensee, and the terms of which he is to conform to so far as they relate to business to be done hereunder), and of connecting with exchange systems which may hereafter be established in any of said places or in exchange districts lying on the direct route between said places, under contracts to be made by the Lessor therefor, to contain stipulations substantially like those in the Lessor's Standard Form 109 C. a copy of which has been furnished to the Lessee, and wishes to use, and allow others to use, said lines for personal communication between said termini and said other places; now it is agreed:

2. This contract shall take effect if, but not unless, the Lessee shall, within months from date, construct a telephone line in conformity with the specifications hereto annexed and made part hereof, from to .

The rights hereby granted to the Lessee shall continue until the first day of , 188 , unless sooner determined as hereinafter provided.

3. The Lessee may construct lines along said described route and may use them for telephonic personal communication between a customer in one such exchange district or above-named place and a customer in another such exchange district or place, and not otherwise, except in connection with extra-route lines owned or specially licensed for the purpose by the Licensor. The Lessee shall not directly or indirectly connect its lines with any telephone or telegraph line or tele-

phone exchange, except lines with which it has been by the Lessor specially authorized to connect; nor deliver messages to be forwarded to destination by telegraph to any telegraph company, except such as may be specially designated by the Lessor for that purpose, so far as it can lawfully control the same, or unless specially directed by a customer so to do (but it will not solicit such special direction nor receive and pay tolls over other lines unless compellable by law so to do). For the purpose of establishing telephonic personal communication between customers as aforesaid, the Lessee may have and exercise all the right to construct and operate telephone lines in said exchange districts, and there maintain suitable offices and connect with exchange systems established or to be established, as aforesaid, which the Lessor has reserved and is or may be entitled to grant for extra-territorial connecting lines under licenses to exchanges made or to be made, as aforesaid; but the Lessee shall connect with each local exchange established or which may be established and do its business, so far as the same can, in the opinion of the Lessor, conveniently be so done, with the customers thereof through said exchange, unless the American Bell Telephone Company or its successors shall decide that the exchange fails to furnish proper facilities. For the purpose of this contract an exchange district means a territory, not to cover more than a single town or city, or a circle of fifteen miles radius measured from a central point, which the Licensor has included and covered or may hereafter include and cover in and by an exchange license.

4. The Licensor, at its general office or factory, will deliver to the Lessee, as called for, electric speaking telephones, made and to be used under its patents during the existence of the rights hereby granted and as herein set forth and permitted, and all telephones delivered to the Lessee during the continuance hereof shall be deemed to be furnished hereunder, unless otherwise specially designated by the Licensor. They will be of such character and pattern and bear such marks as the Lessor shall from time to time determine, but the Lessee may choose from among such standard patterns. Each of said telephones shall remain the property of the Licensor, and is hereby leased, and the use of it is hereby licensed for the purposes herein declared for the term of one year from the day when

rent and royalty begins to accrue on it, as herein provided; but the due payment thereof to the Licensor, and the due performance of the stipulations hereof during said year by the Lessee and those using the telephone under it, shall *ipso facto* operate to renew the ease and license for another year, and so on until the expiration or other determination hereof, in no case, however, beyond the term defined by Article 2. The Licensee shall pay to the Licensor a rental and royalty at the rates named below, to commence on each instrument on the first day of the second calendar month after its shipment by the Licensor, to continue until the instrument shall be put into the possession of the Licensor, or proved to be destroyed, and to be paid in equal monthly payments in advance at the Licensor's office, on the tenth day of each month up to the last day of the same month. Until otherwise fixed, the rates shall be as follows: —

Battery transmitter, each instrument . .	per year,	$10.00
Magneto-telephone, each instrument . .	"	$10.00

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Upon each instrument unlawfully detained from the Lessor, the Lessee shall pay five dollars per month until satisfactory proof of its destruction be furnished, and five dollars for each lost or destroyed otherwise than by fire or inevitable accident, and shall also bear the expense of ordinary repairs; but said payments shall not confer any right to the instrument, nor to its use, nor satisfy any other breach of covenant, nor impair the right of the Licensor to obtain possession of any instrument or lines.

5. The right and license hereby granted is the right and license to use said telephones to carry on personal communication, upon their own business, by and between customers and their employés personally present at instruments in different towns or exchange districts above named, over circuits composed exclusively of said authorized lines owned by the Lessee and the lines of the exchange licensed by the Licensor and with which the Licensee is authorized to connect as aforesaid, and between any such customer and a customer so using the telephone in an extra-route place by means of such lines of the Lessee and other lines and instruments specially

licensed by the Licensor therefor; but the telephones furnished hereunder are not to be used to connect parties in the same town or exchange district, nor to connect persons in different towns which may hereafter be included in one exchange district after the same have been so included, nor for the transmission of general business messages, market quotations, or news for sale or publication, in competition with the business of any telegraph company; and the Lessee, so far as it can lawfully and properly prevent it, will not permit the same to be so used. The term "general business messages" is defined to mean all communications in behalf of other parties than those who directly communicate by the telephone by themselves or their servants or agents personally present at the instruments, and no person engaged in the business of transmitting messages for other parties shall be authorized or knowingly allowed by the Lessee, its servants or agents, to transmit such messages through the telephone. The Lessor will not furnish or license telephones to any other party to establish such personal communication by said route between persons in one of said places or exchange districts with persons in another of said places or exchange districts while the rights of the Lessee hereunder exist, except so far as the Lessor's existing contracts with the Western Union Telegraph Company, and with others, may require it so to do, or as it may see fit so to do under contracts hereafter to be made for exchange, private, club, social, and other lines substantially as defined in its Standard Forms Nos. 109 C and 116 C, but the Lessee shall furnish sufficient general lines for general customers, and special lines for individual or associated customers over said route and for the purposes aforesaid, at prices which shall be reasonable under the circumstances hereunder.

6. The Lessor will license to be used with such telephones the inventions in call-bells, switches, switch-boards, and other apparatus needed for such telephone lines, which it can so license, upon such royalties as it may from time to time establish, not greater than those fixed for others under similar circumstances; but such call-bells, switches, switch-boards, and other apparatus shall be used only with telephones licensed by the Lessor, and the Lessee agrees not to use them otherwise, nor to dispose of them to any one except those so licensed, or to the licensed manufacturers of the Lessor.

The Licensee may enjoy any rights of way and similar franchises to maintain said lines which the Lessor can permit him to use when and so long as, in the judgment of the Lessor, it shall not interfere with the enjoyment thereof by the Lessor or its other grantees, and shall pay whatever may be due to third persons, if anything, growing out of or in connection with such use by it. The Lessor reserves the right to use telephones on lines passing over said route either terminus of which is beyond or off of said route, for the purpose of establishing personal communication or transmitting messages between any such point and any point within or without the route licensed, and, to establish lines for that purpose, may enjoy any rights of the Lessee to erect and maintain lines, and may string its wires on the poles of the Lessee, paying therefor a pole rental of $4 per mile per annum for each wire. The Lessee will allow the Lessor to connect any other wires with its said lines in order to constitute thereby a through line, of which at least one terminus shall be beyond or off of said route and of which the Lessee's line can form a portion or link, in order to forward through messages, will make or permit to be made convenient switch-board or other connections for that purpose, and as compensation therefor will take a share of the through toll (terminal expenses being first deducted) *pro rata* according to distance, not greater than that customarily charged by it for like distances, and will also allow any telephone exchange to be designated by the Lessor to connect with its lines for the purpose and substantially in the manner described in the Lessor's Standard Forms 109 B, 109 C. In respect of all communications originating on its lines and which are to be forwarded over any other lines, the Lessee shall require the customer or subscriber to bind himself by and make every message subject to such contracts, stipulations, and limitations of liability of such other lines as the Licensor may from time to time require, in such form as it may from time to time prescribe, and will hold the Lessor harmless from all loss or expense consequent upon its failure so to do.

7. The Lessee admits the validity of all patents relating to telephony and telephonic appliances, now or hereafter held by the Licensor, or under which it may hold licenses exclusive in their character and the validity of its title thereto, and will not dispute the same nor

make, use, or be interested in any telephones or telephonic lines or business not licensed by the Licensor or its assigns.

8. The Lessee will pay to the exchanges established, or which may hereafter be established, and with which it shall connect as aforesaid, such sums as such exchanges are or shall be entitled to receive under their exchange contracts made, or to be made, for making connections with extra-territorial lines. And the Lessee will also pay to the Lessor, in addition to said telephone rental and royalty, and in consideration of the further rights and privileges hereby granted, one fourth of the Lessee's gross receipts from subscriptions and tolls (which tolls shall not be less than at the rate of fifteen cents for the first ten miles or fraction thereof, and five cents for each additional ten miles for a communication occupying not more than five minutes), after deducting for terminal expenses such sums as it may have to pay to the terminal exchange, not exceeding those chargeable under exchange contracts made or to be made by the Licensor as aforesaid. Said payments are to be made to the Lessor at its office on the tenth day of each month, upon all receipts up to the first day thereof. The Lessee shall keep full accounts of such receipts and payments, furnish copies thereof to the Licensor upon request, and exhibit its original accounts and vouchers so far as may be proper to verify the same.

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9. The Lessee may place the telephones furnished hereunder in its own offices, for use, by general customers, as herein stated and limited, or may place them under subleases and licenses in connection with its lines, on the premises of subscribers or special customers for such uses. Such subleases and licenses shall, in such form as the Licensor shall from time to time approve, express the title of the Licensor to the telephone and the patents, the extent of the license hereby granted, the purposes for which the telephone may be used, that any other use of any telephone by any person, or nonpayment of the rental and royalty to the Licensor, is an injury to and invasion of its rights as owner thereof and of the patent rights used therein and thereby, and entitling it to all rights and remedies in law and in equity, under the patent laws and as herein expressed

otherwise, including the remedy by injunction against the person in possession thereof, and all others who have misused the same as foresaid for any use not justified by a subsisting license, or for the violation of any other of its rights. It may also enforce against such sub-licensee all rights and pursue all remedies given by and under such sub-license, and may use the name of the Lessee for such purpose, or may require the Lessee, at his own expense, to enforce the terms of such contracts.

10. If the Lessee shall fail to make any of the payments herein stipulated when due, or shall fail to keep any of the terms hereof, and such default shall continue during a period of sixty days after written notice thereof from the Lessor, or shall become bankrupt or insolvent, the Licensor may, if it shall so elect, by a written notice to the Lessee (or those in charge of any of its principal offices), terminate all rights granted by the Licensor hereunder, and by itself or those designated by it for the purpose, by due process of law or by actual entry, may and shall be entitled to repossess itself of the rights and privileges herein granted, and thereafter use and enjoy the same; and especially may take possession of and remove said telephones, or sever the wires to which they are connected, and connect its own wires to said severed wires, telephones, and apparatus, and use the same by itself and by those whom it may permit; or it may, so long as it shall see fit, leave in the enjoyment and use of the telephones any person in actual possession, and collect from him such sums as are or may become due for the use of the telephones, wires, and appliances, used therewith, and for that purpose shall be entitled to and may take possession of all the lines, fixtures, apparatus, appliances, and premises of the Lessee used for carrying on this business, and occupy and operate the same in connection with said telephones and other telephones connected or to be connected therewith, or connect such lines with offices of its own for that purpose. The Licensor shall have the like right upon or within three months after the termination of the rights of the Licensee hereunder by efflux of time or otherwise; and may enforce this provision by an entry without being deemed guilty of any trespass, or by legal process, including an injunction to prevent any interference with the Licensor and others permitted by it in the use of said telephones, lines, and appa-

ratus. The property so taken and which does not belong to the Lessor or revert to it hereunder may be returned within three months from the taking, in which case the Lessor shall pay to the Lessee a reasonable compensation for the use thereof, or the Lessor may retain the same as its own property, and shall pay therefor a reasonable price, in no case exceeding the actual cost, within four months after the taking, and shall account to the Lessee for all sums collected which accrued before the Licensor became so entitled to possession, first deducting all expenses incident thereto, and all that may be due from the Lessee to it. The Lessor also reserves all its rights and remedies in law and in equity under the patent laws or otherwise, including the remedy by injunction against the Lessee or those claiming under it, for the use of any of its patented inventions or instruments not justified by a subsisting license hereunder, or for the violation of any other of its rights. The Lessor may also use the name of the Lessee to protect its interests and enforce its rights hereunder, and the Lessee shall execute assignments in accordance herewith.

11. This contract is personal to the Lessee herein named, and any assignment or attempt to assign the same or the lines established hereunder by act of the party or operation of law, without the written consent of the Licensor, shall be a violation hereof, and good ground for a cancellation hereof by the Licensor; but consent shall be given to an assignment by the Lessee or by his executors and administrators to any party who in the opinion of the Licensor is fitted and suitable to carry on the business, and who shall in writing become bound by the terms hereof. The party of the second part covenants that he will keep and observe all the stipulations herein contained on his part to be kept and performed. Whenever the Licensor grants to others the rights for exchanges or extra-route lines or any other rights remaining to it, the stipulations hereof relating thereto shall be binding upon and enure to the benefit of such grantees, and the Licensor shall not be responsible for their acts or defaults. If the Licensor shall transfer to any party who shall agree to perform the stipulations thereof, its title to the telephones hereby leased, and the patent rights under which they are licensed, and its then existing rights hereunder, it is agreed that the provisions hereof enure to the benefit of and are binding upon such party in respect of

all things done or to be done after such assignment, as if it were named a party, and that said American Bell Telephone Company shall no longer be responsible hereunder. Words herein referring to the party of the second part shall be taken to be of such number as may be required.

Signed on the first day above written, in duplicate.

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This cause was thence continued to the October Term of this Court, A. D. 1890, when, on the nineteenth day of February, 1891, the master filed his report with accompanying papers, and on the twentieth day of February, 1891, the following agreement was filed: —

(12) AGREEMENT FOR WITHDRAWAL OF MASTER'S REPORT.

[Filed Feb. 20, 1891.]

It is agreed that the paper filed in this case as the master's report shall be taken into his custody and considered as not filed (with all accompanying documents).

GEO. S. HALE, *for plaintiff.*
W. G. RUSSELL, *for defendant.*

Thereupon the said master's report and accompanying papers were delivered to the said master by the clerk of this court.

This cause was thence continued to the May term of this Court, A. D. 1891, when, on the first day of June, 1891, the following petition was filed: —

(13) PETITION FOR LEAVE TO DISMISS BILL WITHOUT PREJUDICE, WITH COSTS.

[Filed June 1, 1891.]

The Western Union Telegraph Company, complainant, showeth that your petitioner having exhibited its bill in this Honorable

Court against the above named defendant, which has appeared and put in its answer thereto, your petitioner is now advised to dismiss its said bill. Your petitioner therefore humbly prays that the said bill may stand dismissed out of this court without prejudice but with costs to be taxed by the clerk.

WESTERN UNION TELEGRAPH COMPANY,
By J. H. BENTON, JR.,
Attorney.

On the eleventh day of August, 1891, the following master's report was filed with the papers therein mentioned: —

(14) MASTER'S REPORT.

[FILED AUG. 11, 1891.]

In pursuance of the rule of court, I have met and heard the parties and their counsel, and report as follows: —

The bill is brought to require the defendant company to account for and transfer to the plaintiffs, represented by the Western Union Telegraph Company, one fifth part of a large number of shares in the capital stock of sundry corporations, operating telephone exchanges in the United States, and of the dividends received thereon, and one fifth of certain sums paid the defendant for licenses to connect telephone exchanges with each other, and one fifth of any and all bonds or other securities or property received for licenses as aforesaid, with interest, as more fully appears by the bill.

The controversy involves the construction of a contract made Nov. 10, 1879, to remain in force for seventeen years from that date, between the plaintiffs of the first part, and the National Bell Telephone Company of the second. The defendant has succeeded, in all respects, to the obligations and rights of the National Bell Telephone Company, the change being merely in the name of the corporation so far as this case is concerned. It will, therefore, be convenient to speak of the defendant as the party of the second part in the said contract.

The contract was the final and successful result of negotiations extending over seven or eight months, looking to a settlement of the conflicting titles and claims of the parties to inventions relating to

telephones. The defendant owned the patents of Bell, and the plaintiffs owned or controlled those of Edison, Gray and others.

The contract gives the general conduct of the telephone business to the defendant, and a license to use the plaintiffs' patents, and the defendant agrees to pay the plaintiffs twenty per cent. of rentals and royalties received from licenses to use telephones in the United States.

The question in the case is whether this twenty per cent. is to be recovered upon all sums received or profits made by the defendant in the telephone business or only upon certain annual rentals.

A telephone exchange is an arrangement for putting up and maintaining wires, poles and switchboards within a given area, with a central office and the necessary operators to enable the individual hirers of telephones within that area to converse with each other. The value to the customer, and therefore the amount he is willing to pay, depends upon the number of persons with whom he can converse, — that is, the number of subscribers to the same exchange. In a large city the charge may be six or seven times as great to each customer as in a smaller place. The profit to the owner of the exchanges must vary in somewhat similar proportions with the number of telephones licensed and used.

The shares of which the plaintiffs require one fifth to be accounted for were in nearly all cases obtained in the way to be presently mentioned, but reference may be had for their terms to the contracts reported herewith. The defendant issued to a corporation a license to use telephones for five years in an exchange to be established by and at the expense of the licensee in a certain place, paying the usual rentals, and reserved the right to take the plant at actual cost less depreciation at the end of the term, allowing nothing for franchise or good will. These short term contracts either expired or were surrendered by the licensees and thereupon the defendant gave them "perpetual" exclusive licenses for the agreed locality, and received these shares, usually thirty-five per cent. of the entire capital stock, for which it paid nothing except the exclusive perpetual license. If a license was surrendered before the original term had ended, the defendant agreed to receive no dividends until that term would have ended.

The Exchange Company agreed to pay the standard annual rentals to the defendant as before.

The contract, with its schedules, occupies forty-three pages of the printed record, beginning at page 235 [18], and may be referred to.

It opens thus:

"Article 1, (1) The party of the second part shall pay to the party of the first part, upon all telephones used in the United States, under any license from the party of the second part express or implied unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid in accordance with the provisions of this contract for licenses or leases of speaking telephones, exclusive of call-bells, batteries, wires and other appliances, or services furnished or performed."

It then explains that the net rentals and royalties are those on which the royalty or bonus is to be reckoned, after deducting from the gross amounts certain allowances afterwards specified.

By Article 2 (2), page 236 [19], the standard gross rental for a single telephone where only one is used as a terminal or station is recognized as ten dollars per annum and fifteen dollars for a pair, and the second party may change their charges subject to the qualifications of sections (4) and (5) of that article.

By Article 2 (3), page 237 [19], telephones used on exchanges or lines owned in whole or partly by the defendant, or by auxiliary corporations or organizations in which it is interested, or rented with lines so owned, are to be "rated" as paying the above-mentioned standard rates or such other rates as may be established for other parties in accordance with the terms of the contract. But when the defendant is or shall be interested with others in the ownership of such exchanges or lines, the annual rental or royalty actually received if greater than the established rates, shall be taken as the gross rental for the purpose of ascertaining the stipulated bonus or royalty.

Article 2 (4), page 237 [20], provides that no reduction from the standard rates which shall be made on telephones or lines owned in whole or in part, by the party of the second part or by auxiliary corporations or organzations in which it is interested, or rented together with lines so owned, shall operate to reduce said royalty or bonus to be paid to the party of the first part below one dollar per annum

for each terminal single telephone and one dollar and eighty cents for each terminal pair, unless by consent or as provided in Sect. 5.

(5), pages 237 [20] to 241 [23], provides an elaborate scheme for arbitration in case of disagreement as to reductions.

By Article 3, pages 241, 242, [page 24,] the following commissions and allowances are to be made from the gross rentals. On telephones used in district or exchange systems owned in whole or in part by the defendant or by auxiliary corporations or organizations in which it should be interested, thirty per cent.

On telephones taken by the plaintiffs for private lines, or usedby the defendant on its own lines or put out by it, by its own officers or servants for any use other than on district or exchange systems, in which it should be interested, as aforesaid, twenty-five per cent.

On all other telephones the rate actually paid, not exceeding forty per cent.

The rentals have not been substantially changed, except that $20 has been charged for a pair of telephones instead of $15. The net rentals have been from $6 to $7 for a single telephone, and from $12 to $14 for a pair; and of this the plaintiffs' share is one fifth, which they have received as hereinafter stated.

By Article 6, page 246 [28], the plaintiffs agreed to withdraw from the manufacture, rental and use of telephones, except as excepted in the contract.

The defendant bought of the plaintiffs all their telephones, and all machinery, plant, etc., except the stock in four or five exchanges owned wholly or in part by the Western Union Company.

The plaintiffs licensed the defendant exclusively to use all the inventions owned or controlled by them. They agreed to assume and pay twenty per cent. of all expenses of litigation in connection with the patents of either party.

By Article 4 (2), page 243 [25], the defendant may acquire such new inventions in telephones as it shall deem advisable, and may introduce such of them as it sees fit into the construction of its licensed telephones and may reimburse itself for the cost thereof by an additional price to customers, in which plaintiff shall not share until such reimbursement, unless the plaintiff chooses to pay twenty per cent. of such cost, or if the party of the second part shall deem it ad-

visable not to raise the price, the plaintiff will bear twenty per cent. of the cost (with some limitations).

By Article 5 (3), page 245 [27], if the plaintiff shall require other inventions, the defendant, will pay the cost or a proportionate part thereof, according as I understand, to the proportion of time which the contract had to run and the proportion in which telephones might be affected by the invention.

By Article 12, page 256 [36], "the right to all uses of the telephone on wires of a district or exchange system is to remain exclusively with the party of the second part," with a temporary exception not now important.

By Article 13, page 257 [37], "the right to connect telephonic district or exchange systems for the purpose of personal conversation between persons at the instruments, and the right to use telephones on all lines not forming part of a telephonic or exchange system for such personal conversation (except so far as licenses for private lines are to be granted to the party of the first part under Article 14) are to remain exclusively with the party of the second part and those licensed by it for the purpose. But such connecting and other lines are not to be used for the transmission of general business messages, market quotations or news for sale or publication in competition with the business of the Western Union Telegraph Company, or with that of the Gold & Stock Telegraph Company," etc.

By Article 14, page 259 [39], the defendant agrees to license the plaintiffs to use telephones for transmitting telegraph messages and for use on private lines, which were defined (page 260 [40]) to be lines each consisting of a single circuit on which the telephones were to be used for the individual and private business of the lessees and not for other business nor for a consideration or toll.

The defendant was to turn over to the Western Union Company as far as possible all messages which were to be transmitted by telegraph for a commission of fifteen per cent.

The parties agreed that the contract should be a settlement of all suits.

By Article 18, page 264 [44], the defendant agreed to keep accounts of the number of telephones manufactured, licensed and put out for use in the United States, and also of the rentals received and

commissions or allowances paid or allowed as in the contract provided, and to render accounts and pay balances quarterly.

The defendant accounted quarterly for the rentals as they construe the contract, and paid the balances from Nov. 10, 1879, to Feb. 1883. Feb. 26, 1883, the plaintiffs wrote asking for an account of the shares and moneys now in dispute (page 233), which was refused (page 234).

The contentions of the parties, according to my understanding of them, are these :—

The plaintiffs maintain,—

1. The shares having been received in consideration of the grant of a license to use telephones must be rentals or royalties from licenses or leases, within the terms of the contract, or a substitute evasive or otherwise for such rentals and royalties.

2 The right or option to take the plant at the end of the five years was itself given by the lessee for the grant of the original license and therefore part of the royalty paid or promised for that license, and if by virtue of that option the defendant had the power to exact a payment in stock for relinquishing the right, the stock is, in effect, a part of the royalty.

3. They deny that the defendant has the sole right to conduct the telephone business, but admit only its exclusive right to the use of telephones in exchanges ; they contend that this does not mean that it may take the profits of the business, subject to a rental, but merely that the plaintiffs will not interfere with the management of the business, reserving the right to share in its profits.

4 That the defendant is the trustee of a joint business, arising from a combination of their several patents, and that any profit which it makes must be divided with its partner, though the precise form and kind of profit may not have been anticipated when the contract was made, or was not specially mentioned therein. They liken it to a profit made by a trustee out of the trust estate.

5. That the language of the contract must be taken most strongly against the defendant as the grantor of the rentals and royalties.

6. That the word rental has always been used in the licenses and contracts of the defendant up to Nov. 10, 1879, and that the word royalty was added in this contract at the express demand of the

plaintiffs in order to include something which may not be strictly speaking, rental, but derived from the patents and not obtainable except by their use.

7. They object to the admission of evidence of the course of business of the parties or their negotiations and correspondence to assist in construing the contract; but if admitted, they consider that it sustains their view of the case.

As to the fact contended for in No. 6, that the word royalty was not used in the contracts or licenses of the defendant before Nov. 10, 1879, I find that all the very many (185) contracts were open to the inspection of the plaintiffs, and certain of them were admitted to be fair samples of the whole, and are in the case. In none of these, that I can find, is the word royalty used before Nov. 10, 1879; and I consider it a proper inference that it was not so used.

As to No. 7, the defendant contends, as hereinafter mentioned, that correspondence and other evidence of the nature objected to was read by the plaintiffs' counsel in opening their case, without objection, and that after this the objection to the remainder of that evidence comes too late.

The defendant contends: —

1. That the contract contemplates uniformity in their royalties and rentals for each kind of license or class of telephones; that rentals and royalties in this connection mean the same thing, that is, rentals.

2. That the rentals and royalties which are to be accounted for are the sums mentioned in the contract as the standard annual rentals (less commissions) and nothing more, unless it should raise the rental for any class of telephones, as it has done in one instance.

3. That the telephone business is left absolutely in its hands, and that it has by express words the exclusive right to carry on the exchange business; and also the business of connecting exchanges, which implies the right to license others to carry it on; and it has the right to make such terms as it may be able to make with licensees, holding itself accountable to the plaintiffs only for the standard rentals.

4. That the shares in controversy were received in consideration of the defendant's consent not to carry on the exchange business and

are in fact a mode of receiving its share in the profits of the business.

5. The defendant further strenuously maintains that if any doubt exists as to the meaning of the contract, the Master and the Court should consider the previous course of business of the defendant so far as known to the plaintiffs, and the conversations and correspondence of the parties before the conclusion of the agreement, to explain its meaning, and that this evidence clearly shows the meaning of the contract to be such as they contend for. They insist that the plaintiffs' counsel put in a part of the evidence in his opening argument, and thereby admitted the whole. See the stenographer's report of the argument herewith returned.

6. The defendant insists that the plaintiffs, by failing to give notice of their claim during three years, have given a contemporaneous construction of the contract; and that they are beside estopped by laches from making claim for a part of the shares.

7. If profits are to be considered to be rentals or royalties, still the plaintiffs should have a fifth part of those profits only which accrue during the seventeen years of this contract, that is, of the dividends earned on the shares in those years.

By the rule, I am required to report my findings of law. It will be difficult to do this, without giving reasons; and perhaps, impossible to give reasons without arguing the case. Trusting that the Court will make due allowance for this position, I proceed to report.

The contract appears to me to require for its true interpretation an examination of the course of business and other matters relied on by the defendant; and the cases cited in its brief and which will no doubt be cited to the Court seems to me to authorize such examination.

Both parties were, in 1879, and before, owners of patents relating to telephones, and both owned some exchanges; but the more usual mode of realizing the profits from their inventions in the United States, was to own the telephones and let them out to hire for annual rent. When the defendant owned the exchanges it charged itself the annual rentals precisely as it did to strangers.

The rentals had come to be nearly uniform for the different classes of business, at about the rates mentioned in the contract. The general course of each company was known to the other. At the request

of the defendant's counsel, I add that several of the defendant's contracts are mentioned in schedule B of the contract of Nov. 10.

Many suits were pending in 1879, between the parties, or between one party and a licensee of the other. One suit was by the Bell Company against Dowd, which was defended by the Western Union Company.

The affidavit of Mr. Gifford, counsel of the Western Union Company, proves that after the testimony in the Dowd suit was substantially closed, he became convinced and advised his client that Bell was the first inventor of the telephone, and that Dowd had infringed Bell's patent. At the same time he considered that one of the patents owned by the Western Union Company was of much value as an improvement in transmitters. He advised a compromise but failed to agree on one with the counsel of the defendant, and the parties themselves afterwards made the contract sued on here, which met his approval.

This affidavit was made in 1882, and in it Mr. Gifford uses expressions which seem to show his opinion to be that the contract gives the plaintiffs a share "in the results of the combined patents," which is the claim now made by the plaintiffs.

On a first reading of the contract it struck me as meaning what the plaintiffs contend for it; but after careful consideration, I find the defendant's position more sound.

The "rentals and royalties" which are to be divided, are certain annual sums which are definitely fixed in the contract with a certain latitude for increase or diminution.

The word "royalty" was introduced at Mr. Gifford's instance, and he appears to have attached great importance to it; but in this contract it is used interchangeably with "rental" and cannot be construed to mean anything other than rental.

A license is somewhat like a lease, and it will be found that where a specific sum is to be paid periodically or for each machine or other thing used or made under license from a patentee, it is, and was before 1879, not uncommon to use in licenses the words "rental and royalty", as meaning the same thing. It is so used in a book of forms of conveyancing by Leonard A. Jones.

I find it impossible to construe the words of the contract otherwise.

The equally important question remains, whether the defendant, in taking this stock, was violating the true intent of the contract by an evasion, and acquiring something indirectly which it was bound to acquire as rental or royalty.

In this connection I have ventured to inquire whether if there were in the bill a prayer for a reformation of the contract, so as to make it include what the plaintiffs already find in it — that is, a stipulation to divide all the profits of the business — such relief ought to be granted.

It is clear that the exclusive right to do an exchange business was left with the defendant, and I cannot construe this as anything less than the right to the profits of the business; and this whether it carried on the business alone or jointly with others. It was known to the plaintiffs that the defendant, in November, 1879, owned exchanges in Boston and Chicago, and no claim was ever made until the letter of Feb. 26, 1883, for a share in the profits of those exchanges, if that letter intends to include the profits of these exchanges which the defendant considers doubtful. No such claim appears to be made in the bill, nor was it made in the argument.

It was known to the plaintiffs that in several cases the defendant had before Nov. 10, 1879, made short term contracts with a right to buy the plants at the end of the term.

I think it fairly appears by the testimony of Mr. Vail that the plaintiffs knew of the New York contract, made July 3, 1878 (page 302) by which stock was to be given to the defendant after a certain time, pages 110, 121, and *seq*.

It appeared by Mr. Forbes's evidence, page 148, and by the correspondence, that a certain contract made by the parties to this suit with one Ormes, dated Aug. 26, 1879, was the "basis" of the contract in suit. Indeed this appears from a comparison of the two contracts.

The contract (record, page 452) provides that the Western Union Company should receive $1 (with a minimum of 75/100) for each telephone used by Ormes within a large territory, for which he was licensed by both parties, and that the defendant should receive the remainder of the rentals, which would give each of these parties about the same share of the rentals as they now receive.

And the now plaintiffs agreed "to withdraw from said territory as competitors in the telephone business, and neither to use, sell or rent, or license others to use, sell or rent telephones to be used in said territory, leaving the field for the use of telephones entirely to the party of the second part and its licensees and agents." Page 455.

The Ormes contract clearly contemplates that the defendant in any of the several contingencies will carry on exchanges, or authorize them to be carried on, and that it will then pay the $1 to the plaintiffs, and nothing more.

The meaning of the contract of Nov. 10, 1879, though more shortly expressed, appears to me to be the same. Licensees and agents are not mentioned in this connection, though corporations interested with the defendant are. I consider the exclusive right to be alienable.

I do not suppose that either party anticipated the great profits which have proved to be obtainable in the exchange business; and I find that the plaintiffs did maintain for a considerable time during the negotiations that they should share in the business. In two of the drafts submitted by the plaintiffs to the defendant, phrases are found which would have this meaning. Neither of these phrases appears in the final and completed contract, which varies from the Ormes contract chiefly in the agreement of the plaintiffs to bear one fifth of the expenses of litigation and of the purchase of new inventions, though the Ormes contract contained a stipulation that the defendant might increase the rentals until it was repaid the cost of such new inventions.

There is an obvious reason for these changes in that the patents were then united only for a particular territory, and I do not regard them as sufficient to authorize a change of construction, especially as the minimum bonus here is larger than in the Ormes.

No doubt the defendant might have obtained larger rentals for its telephones used in some, or perhaps in all, of the exchanges in question if it had chosen to charge them. They would, however, have varied with each exchange according to the size of the city and other circumstances which would affect the probability of profits to the exchange company. The contract, I think, contemplates a

regular standard rental, substantially alike for each class of business, not to vary with the value of the use in particular cases, as the rental or royalty in which the plaintiffs are to share.

I am of opinion that by the contract the defendant clearly had the exclusive right to carry on the exchange business, alone or jointly with others, and to receive its profits, paying to the plaintiffs twenty per cent. of the stated rentals.

If this be granted, it may still be questioned whether when, in any case, the defendant decides not to carry on the business, but to license a corporation for the purpose, and when it agrees for a share of the profits without putting into the common stock anything but a license to use telephones, the profits may not be considered as rentals for the use of telephones. This point appears to me somewhat less clear that the other.

If that be the fair construction and effect of the contract, the plaintiffs would be entitled to one fifth of the dividends received by the defendants from these shares up to Nov. 1, 1896, the date of the expiration of the contract in controversy. Nor do I think they would be estopped by laches from claiming them. It is argued that the receipt of the shares was open and notorious, and was published in the annual reports of the defendant, all which is true. The argument then is that the value of these shares went to make up the price of the defendant's stock bought in the market.

This argument applies with much less force to the dividends, few of which, I suppose, had been received before the filing of the bill, and one fifth of the probable amount of which for the remainder of the seventeen years would hardly before that time have affected the minds of purchasers of the Bell Telephone shares.

When the bill was filed, the public had notice of the claim.

I do not, however, find that the plaintiffs are entitled to a share of these profits.

The defendant considered that it was selling its exclusive right to carry on the business, and that in whatever way the value of this right was realized, it is the exclusive owner of it, and I so find.

Similar considerations apply to the sums received for licensing the use of lines connecting telephone exchanges with each other. This right was reserved to the defendant and its licensees, and it

could sell it, though the mode of expressing the sale was by a license.

My conclusion is that the plaintiffs are not entitled to an account as asked for.

JOHN LOWELL, *Master.*

The complainants asked to have the evidence reported, and the defendant considers that certain statements made in argument are important. I return herewith the evidence in the case, in three printed volumes, viz:

Vol. I. Oral Evidence and Documents.

Vol. II. Contracts.

Vol. III. Order of Reference, with some printed matter and an index.

Also exhibits: —

1, J. L. Affidavit of George Gifford.

2, J. L. Outline of proposed agreement.

3, J. L. Thirty-four type-written contracts and orders, bound together.

4, J. L. Agreement, Gold and Stock Telegraph Company with defendant *et al.*

5, J. L. Agreement, East Tennessee contract with National Telephone Company.

6, J. L. Agreement, Central New York Telephone and Telegraph Company with defendant.

7, J. L. Agreement, Bell Telephone Company, of Buffalo, with defendant.

8, J. L. Agreement, Ohio Valley Telephone Company with defendant.

9, J. L. Agreement, Colorado Telephone Company with defendant.

10, J. L. Printed Annual Reports of defendant, 1881 to 1886, bound together (six in all).

The arguments in type-writing are returned in five volumes.

After I had filed a report in court, the parties reminded me that they had agreed that a draft report should be furnished them for their suggestions before the final report was made and filed. There-

upon the report was taken from the files by consent, and several hearings were had before me, and I have in some particulars modified my report accordingly. It is understood that the parties are to have thirty days after the filing of that report in which to file exceptions thereto. Exceptions by the complainants were filed with me, but this is not to interfere with their right to file further and other exceptions. These exceptions are returned marked F, J. L.

The complainants filed with me May 7, 1891, a motion for leave to take evidence, herewith returned, marked "B, J. L."; and the affidavit of Norvin Green, marked "C, J. L."; and the affidavit of H. H. Eldred, marked "D, J. L."; having on April 26, 1891, filed the paper marked "A, J. L."

I refused the application.

In June, 1891, the counsel for the complainants notified me that they had filed in court a petition to dismiss the bill, and asked me to make no report pending said petition.

I considered it my duty to proceed and leave to the court all questions arising out of said petition. See paper E.

JOHN LOWELL.

[MEMORANDUM. The papers returned with the Master's Report are contained in six packages, Nos. I. to VI., inclusive. ALEX. H. TROWBRIDGE, *Clerk.*]

On the fourth day of September, 1891, the following Exceptions to master's report were filed by the defendant:

(40) DEFENDANT'S EXCEPTIONS TO MASTER'S REPORT.

[FILED SEPT. 4, 1891.]

The defendant excepts to the master's report filed in the above entitled cause, in the following particulars, and assigns the following exceptions thereto, viz.:

1. That the master has omitted to find as requested by the defendant and as the evidence in the cause required, that the quarterly accountings and settlements made under the contract of Nov. 10,

1879, between the Western Union Telegraph Company and the American Bell Telephone Company from Nov. 10, 1879, to Feb. 26, 1883, were made, and the balances due thereon were received by the Western Union Telegraph Company with knowledge on its part that the defendant was itself operating exchanges, and among them the large exchanges of Chicago and Boston, and that it received during all that time large profits therefrom, and with knowledge that the defendant accounted in respect to such exchanges to the Western Union Telegraph Company only for twenty per cent. of a net rental of seven dollars per telephone for the telephones in use therein and did not include in such accounting any part of said profits and that no objection was made by the Western Union Company to such accounting, nor was any claim made by it to any share in the profits of such exchanges. Whereas the master should have so found.

2. That the Master has omitted to find as requested by the defendant and as the evidence in the case required; that in said quarterly accountings and settlements, and the payments made under the same, the defendant included no return or account of or for the receipts arising from the business of connecting lines between exchanges, and that it only accounted for and paid to the Western Union Telegraph Company twenty per cent. of the net standard rental of the telephones actually in use in such business, which was a very trivial amount; that the Western Union Telegraph Company knew that the business of connecting lines between exchanges and the profits thereof were considerable in amount, and that such profits were in no part accounted for by the defendant, and made no claim thereto or to any part thereof. Whereas the Master should have so found.

3. That the Master has omitted to find as requested by the defendant, and as the evidence in the case required, that said quarterly settlements and accountings were made by the Western Union Telegraph Company with knowledge that the defendant had recieved prior to such settlements in various cases from its licensees, transfers of shares of the capital stock of such licensees in consideration of the exchange of its time contracts for perpetual exclusive, licenses and of its release of the licensees from their obligation to surrender their plant at cost, as set forth in page 3 [124] of the Master's

Report, and with knowledge on the part of the Western Union Telegraph Company that no part of said shares or of the value thereof was included by the defendant in said accountings or settlements or the payments made under the same, and that the Western Union Telegraph Company until Feb. 26, 1883, made no claim that the defendant should so account. Whereas the master should have so found.

4. That the master has omitted to find as requested by the defendant, and as the evidence in the case required, that the quarterly accountings, settlements, payments of balances and receipts thereof so made with knowledge and without claim, made by the Western Union Telegraph Company to any share of the profits of exchanges operated by the defendant, as set forth in Exception 1, and without claim to any share of the profits of connecting lines received by the defendant as set forth in Exception 2, and without claim to any portion of the shares received by the defendant, as set forth in Exception 3, show that the plaintiffs adopted, and both parties to the contract acted upon a contemporaneous construction of the contract of Nov. 10, 1879, which is binding upon the parties, and which is inconsistent with the present claim of the plaintiffs to share in the profits of exchanges operated by the defendant, or in the profits received by the defendant from the business of connecting lines, or in the shares of stock received by the defendant from its licensees, as being rentals or royalties under the terms of that contract.

5. That the master has omitted to find as requested by the defendant and as the evidence in the case required; that the neglect of the plaintiffs, from Nov. 10, 1879, to Feb. 26, 1883, to make any claim to any portion of the profits of the defendant from the business of operating exchanges, and from the business of connecting lines, or to any portion of the shares of stock received from its licensees, with knowledge on the part of the plaintiffs of the receipts of such profits and such shares, constitutes such laches as should stop the plaintiffs from claiming any portion of such profits or shares. Whereas the master should have so found.

W. G. RUSSELL,
for Defendant.

This cause was thence continued to the May term of this court, A. D. 1891. On the nineteenth day of October, 1891, the following joinder was filed: —

(41) JOINDER IN MOTION TO DISMISS.

[Filed Oct. 19, 1891.]

The American Speaking Telegraph Company, the Gold and Stock Telegraph Company and the Harmonic Telegraph Company join in the petition for leave to dismiss the bill heretofore filed by the Western Union Telegraph Company.

By J. H. Benton, Jr.,
Attorney.

On the twenty-third day of January, 1882, the following affidavits were filed by the defendant: —

CIRCUIT COURT OF THE UNITED STATES.

District of Massachusetts.

In Equity.

No. 1,943.

Western Union Telegraph Company et al.

v.

American Bell Telephone Company.

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(42) AFFIDAVIT OF JOHN E. HUDSON.

[Filed Jan. 23, 1892.]

I, John E. Hudson, of Boston, counsellor at law, on oath declare: That I am president of the defendant corporation; that as counsel for said corporation and as its general manager, and as connected with it in various official capacities, I have been and am familiar with the conduct of the above entitled suit, and of the course of proceedings therein from the commencement thereof to the present date.

That, as is shown by the docket entries in said cause, the bill was filed Nov. 16, 1883, the answer June 30, 1884, and the replication Nov. 19, 1884; and the cause was referred to a master, the Hon. John Lowell, May 28, 1886.

Nov. 16, 1887, an order was passed appointing an examiner to take testimony, and thereafter testimony was taken at great length on both sides, the printed record of which occupies upwards of five hundred pages, exclusive of a large number of exhibits produced and made part of the case by stipulation and references, a part of which was produced before the master.

That the cause was fully heard and argued at great length on several days before the master, orally and upon printed arguments, the closing argument for the complainants occupying one hundred and forty-three printed pages.

That on the nineteenth day of February, 1891, the master filed his report in the clerk's office, a copy whereof is hereto annexed.

That at the hearing before the master it was agreed by counsel and assented to by the master that prior to the filing of the report, a draft report should be submitted by the master to counsel, in order that they might present objections thereto or suggestions for any amendments thereof in accordance with the practice of the Courts of Massachusetts, and that the master, upon being reminded of such agreement by counsel, withdrew the report from the files, the counsel on both sides assenting thereto by an agreement in the form following, viz: —

CIRCUIT COURT OF THE UNITED STATES.

DIRTRICT OF MASSACHUSETTS.

WESTERN UNION TELEGRAPH COMPANY

v.

AMERICAN BELL TELEPHONE COMPANY.

FEBRUARY 20, 1891.

It is agreed that the paper filed in this case as the Master's Report, shall be taken into his custody and considered as not filed (with all the accompanying documents).

GEO. S. HALE,
For Plaintiffs.

W. G. RUSSELL,
For Defendants.

That thereafter, said report was submitted and read to counsel by the master at his office, and at the complainants' request thirty days were allowed by the master for each party to submit objections or suggestions for alterations of said report, which time was several times further extended at the request of the plaintiffs' counsel; and on or about May 7, such objections and suggestions were filed with and presented to the master by counsel for the plaintiffs and defendant; and prior to the filing of the plaintiffs' motion to dismiss the bill, the plaintiffs' and defendant's counsel also filed with the master their reply to such objections and suggestions.

That the said report of the master found in favor of the defendant, that the plaintiffs' were not entitled to any of the profits claimed by their bill nor to any account from the defendant.

That the defendant in the defence of this suit has been put to great annoyance and to great expense, beyond the amount of costs taxable therein, and has properly expended therein for counsel fees and otherwise many thousands of dollars.

That a great part of the evidence adduced by the defendant in said suit consists of documents, correspondence, letters and exhibits, written or printed, which were produced before the Examiner and form part of the printed record in the cause, or which were produced before the Master at the hearing, and admitted to be used as evidence in the case. That some of these exhibits are in the custody of the plaintiffs, as also are like documents which were produced in evidence by the plaintiffs; that such evidence is of great importance and value to the defendant for the maintaining of its defence in the cause, or in any case which may be brought upon any new bill for the same or like cause of action or complaint; and that there is great danger that the defendants may lose the benefit thereof, and of other evidence offered and admitted in this cause in any such new suit; and that such loss would be an irreparable injury to the defendant.

That this defendant specifies as part of such evidence: —

1. The testimony of Samuel M. Taylor, a witness called by the plaintiffs and examined by the defendant's counsel, contained on pages 64 to 98, inclusive, of the printed record and the letters, reports, documents and records produced and referred to in the examinations of said Taylor.

2. The testimony of Theodore N. Vail, a witness called by the defendants, contained in pages 98 to 145, inclusive, of the printed record and the documents produced or referred to in his examination.

3. The testimony of William H. Forbes, a witness called by the defendant, contained in pages 145 to 162 of said printed record, and the documents produced or referred to in his examination, including documents numbered I. to XLV., inclusive, contained in pages 163 to 277, inclusive, of said record.

4. Certain contracts and documents contained in pages 287 to 497 of said printed record.

5. The following documents not forming part of the printed record, but returned by the master with his report, the same having been used in evidence before him, viz: —

(*a*) Affidavit of George Gifford made in a suit, American Bell Telephone Company *v.* Ghegan et al.

(*b*) Agreement between Gold and Stock Company, the Bell Telephone Company of New York, and the National Bell Telephone Company, dated April 30, 1880.

(*c*) Agreement between the American Bell Telephone Company and the East Tennessee Telephone Company, dated April 1, 1881, and contracts and exhibits connected therewith.

(*d*) Agreement between the American Bell Telephone Company and the Central New York Telephone and Telegraph Company, dated Jan. 6, 1883, and contracts and exhibits connected therewith.

(*e*) Agreement between American Bell Telephone Company, and Bell Telephone Company of Buffalo, dated July 18, 1883, and the contracts and exhibits connected therewith.

(*f*) Agreement between the American Bell Telephone Company and the Ohio Valley Telephone Company, dated July 18, 1883, and the contracts and exhibits connected therewith.

(*g*) Agreement between the American Bell Telephone Company and Colorado Telephone Company, dated Nov. 13, 1883, and the contracts and exhibits connected therewith.

JOHN E. HUDSON.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

On this thirtieth day of June, A. D. 1891, personally appeared before me, a notary public duly commissioned, the above named John E. Hudson and made oath that the statements contained in the foregoing affidavit subscribed by him are true.

[SEAL] T. FRANK NOONAN,
Notary Public.

CIRCUIT COURT OF THE UNITED STATES.

MASSACHUSETTS DISTRICT.

THE WESTERN UNION TELEGRAPH COMPANY ET AL.
v.
THE AMERICAN BELL TELEPHONE COMPANY.

MASTER'S REPORT.

In pursuance of the rule of court, I have met and heard the parties by their counsel, and have examined the evidence, and I report as follows: —

This bill is brought to require the defendant company to account for and transfer to the plaintiffs one fifth part of a large number of shares of the stock of sundry corporations, operating telephone exchanges in the United States, which it has received in payment for exclusive licenses to those corporations to use telephones in their several exchanges; and one fifth of certain sums paid the defendant for licenses to connect such exchanges with each other.

The pecuniary importance of the former claim is very large, and as the questions involved are the same whether shares or moneys are in question, it will be enough to consider the case in relation to the former.

The controversy involves the construction of a contract made Nov. 10, 1879, and to remain in force for seventeen years from the first day of that month, between the plaintiffs of the first part, and the

National Bell Telephone Company of the second part. The defendant has succeeded in all respects to the obligations as well as the rights of the National Bell Telephone Company, and it will be convenient to speak of the defendant as the party of the second part in the contract.

The contract was the final and successful result of negotiations extending over seven or eight months, looking to a settlement of the conflicting titles and claims of the parties to inventions relating to telephones. The defendant owned the patents of Bell, and the plaintiffs owned or controlled those of Edison, Gray and others.

The contract gives the general conduct of the telephone business to the defendant, and a license to use the plaintiffs' patents, and the defendant agrees to pay the plaintiffs twenty per cent. of rentals and royalties received from licenses to use telephones in the United States.

The question in the case is, whether this twenty per cent. is to be reckoned upon all sums received or profits made by the defendant in the telephone business or only upon certain annual rentals.

A telephone exchange is an arrangement for putting up and maintaining wires, poles and switchboards within a given area, with a central office and the necessary operators, to enable the individual hirers of telephones within that area to converse with each other. The value to the customer, and therefore the amount he is willing to pay, depends upon the number of persons with whom he can converse, — that is, the number of subscribers to the same exchange. In a large city the charge may be six or seven times as great to each customer as in a smaller place. The profit to the owner of the exchanges must vary in somewhat similar proportions.

The shares of which the plaintiffs require one fifth to be accounted for were in nearly all cases obtained in this way.

The defendant issued to a corporation a license to use telephones for five years in an exchange to be established by and at the expense of the licensee in a certain place, paying the usual rentals, and reserved the right to take the plant at actual cost less depreciation, at the end of the term, allowing nothing for franchise or good will. These short term contracts either expired or were surrendered by the licensees, and thereupon the defendant gave them " perpetual "

exclusive licenses for the agreed locality, and received these shares, usually thirty-five per cent. of the entire capital stock, for which it paid nothing except the exclusive perpetual license. If a license was surrendered before the original term had ended, the defendant agreed to receive no dividends until that term would have ended.

The exchange company agreed to pay the standard annual rentals to the defendant as before.

The contract, with its schedules, occupies forty-three pages of the printed record, beginning at page 235.

It opens thus: —

"Article 1 (1). The party of the second part shall pay to the party of the first part upon all telephones used in the United States, under any license from the party of the second part express or implied, unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid in accordance with the provisions of this contract for licenses or leases of speaking telephones (exclusive of call-bells, batteries, wires and other appliances, or services furnished or performed)."

It then explains that the net rentals and royalties are those on which the royalty or bonus is to be reckoned, after deducting from the gross amounts certain allowances afterwards specified.

By Article 2 (2), page 236, the standard gross rental for a single telephone where only one is used as a terminal or station is recognized as ten dollars per annum and fifteen dollars for a pair, and the second party may change their charges subject to the qualifications of sections (4)and (5) of that article.

By Article 2 (3), page 237, telephones used on exchanges or lines owned in whole or partly by the defendant or by auxiliary corporations or organizations in which it is interested, or rented with lines so owned, are to be "rated" as paying the above mentioned standard rates or such other rates as may be established for other parties in accordance with the terms of the contract. But when the defendant is or shall be interested with others in the ownership of such exchanges or lines, the annual rental or royalty actually received, if greater than the established rates shall be taken as the gross rental for the purpose of ascertaining the stipulated bonus or royalty.

Article 2 (4), page 237, provides that no reduction from the

standard rates which shall be made on telephones or lines owned in whole or in part by the party of the second part, or by auxiliary corporations or organizations in which it is interested, or rented together with lines so owned, shall operate to reduce said royalty or bonus to be paid to the party of the first part below $1 per annum for each terminal single telephone, and $1.80 for each terminal pair, unless by consent or as provided in Sect. (5).

(5), pages 237 to 241, provides an elaborate scheme for arbitration in case of disagreement as to reductions.

By Article 3, pages 241, 242, the following commissions and allowances are to be made from the gross rentals:

On telephones used in district or exchange systems owned in whole or in part by the defendant, or by auxiliary corporations or organizations in which it should be interested, thirty per cent.

On telephones taken by the plaintiffs for private lines, or used by the defendant on its own lines or put out by it, by its own officers or servants for any use other than on district or exchange systems in which it should be interested as aforesaid, twenty-five per cent.

On all other telephones the rate actually paid, not exceeding forty per cent.

The rentals have not been substantially changed, except that $20 has been charged for a pair of telephones, instead of $15. The net rentals have been from $6 to $7 for a single telephone, and from $12 to $14 for a pair; and of this the plaintiffs' share is one fifth, which they have received as hereinafter stated.

By Article 6, page 246, the plaintiffs agreed to withdraw from the manufacture, rental and use of telephones, except as excepted in the contract.

The defendant bought of the plaintiffs all their telephones, and all machinery, plant, etc., except the stock in four or five exchanges owned wholly or in part by the Western Union Company.

The plaintiffs licensed the defendant exclusively to use all the inventions owned or controlled by them. They agreed to assume and pay twenty per cent. of all expenses of litigation in connection with the patents of either party.

By Article 4 (2), page 243, the defendant may acquire such new inventions in telephones as it shall deem advisable, and may intro-

duce such of them as it sees fit into the construction of its licensed telephone, and may reimburse itself for the cost thereof by an additional price to customers, in which plaintiff shall not share until such reimbursement, unless the plaintiff chooses to pay twenty per cent. of such cost, or if the party of the second part shall deem it advisable not to raise the price, the plaintiff will bear twenty per cent. of the cost (with some limitations).

By Article 5 (3), page 245, if the plaintiff shall acquire other inventions, the defendant will pay the cost or a proportionate part thereof, according (as I understand) to the proportion of time which the contract had to run and the proportion in which telephones might be affected by the invention.

By Article 12, page 256, "The right to all uses of the telephone on wires of a district or exchange system is to remain exclusively with the party of the second part", with a temporary exception not now important.

By Article 13, page 257, "The right to connect telephonic district or exchange systems for the purpose of personal conversations between persons at the instruments, and the right to use telephones on all lines not forming part of a telephonic or exchange system for such personal conversation (except so far as licenses for private lines are to be granted to the party of the first part under Article 14), are to remain exclusively with the party of the second part and those licensed by it for the purpose. But such connecting and other lines are not to be used for the transmission of general business messages, market quotations or news for sale or publication in competition with the business of the Western Union Telegraph Company, or with that of the Gold and Stock Telegraph Company", etc.

By Article 14, page 259, the defendant agrees to license the plaintiffs to use telephones for transmitting telegraph messages and for use on private lines, which were defined (page 260) to be lines each consisting of a single circuit on which the telephones were to be used for the individual and private business of the lessees, and not for other business nor for a consideration or toll.

The defendant was to turn over to the Western Union Company as far as possible all messages which were to be transmitted by telegraph, for a commission of fifteen per cent.

The parties agreed that the contract should be a settlement of all suits.

By Article 18, page 264, the defendant agreed to keep accounts of the number of telephones manufactured, licensed and put out for use in the United States, and also of the rentals received and commissions or allowances paid or allowed as in the contract provided, and to render accounts and pay balances quarterly.

The defendants accounted quarterly for the rentals and paid the balances from Nov. 10, 1879, to February, 1883. Feb. 26, 1883, the plaintiffs wrote asking for an account of the shares and moneys now in dispute (page 233), which was refused (page 234).

The contentions of the parties, according to my understanding of them, are these : —

The plaintiffs maintain, —

1. The shares having been received in consideration of the grant of a license to use telephones, must be rentals or royalties for licensees or leases, within the terms of the contract, or a substitute, evasive or otherwise, for such rentals and royalties.

2. The right or option to take the plant at the end of the five years was itself given by the lessee for the grant of the original license, and therefore a part of the royalty paid or promised for that license, and if by virtue of that option the defendant had the power to exact a payment in stock for relinquishing the right, the stock is, in effect, a part of the royalty.

3. Granting that the defendant has the sole right to conduct the telephone business, and the exclusive right to the use of the telephone in exchanges ; this does not mean that it may take the profits of the business, subject to a rental, but merely that the plaintiffs will not interfere with the management of the business.

4. That the defendant is a trustee of a joint business arising from a combination of their several patents, and any profit which it makes must be divided with its partner, though the precise form and kind of profit was not anticipated when the contract was made or was not specially mentioned therein. They liken it to a profit made by a trustee out of the trust estate.

5. That the language of the contract must be taken most strongly against the defendant as the grantor of the rentals and royalties.

6. That the word rental had always been used in the licenses and contracts of the defendant up to Nov. 10, 1879, and that "royalty" was added in this contract, at the express and urgent demand of the plaintiffs in order to include something which is not or may not be, strictly speaking, rental.

7. They deny the soundness of the contention of the defendant that evidence of the course of business and of the negotiations before Nov. 10, 1879, may be referred to, and say that if admitted it is favorable to their case.

The defendant contends: —

1. That the contract contemplates uniformity in the royalties and rentals for each kind of license or class of telephones; that rentals and royalties in this connection mean the same thing as rentals.

2. That the rentals and royalties which are to be accounted for are the sums mentioned in the contract as the standard annual rentals (less commissions) and nothing more, unless it should raise the rental for any class of telephones, as it has done in one instance.

3. That the telephone business is left absolutely in its hands, and that it has, by express words the exclusive right to carry on the exchange business; which implies the right to license others to carry it on; and it has the right to make such terms as it may be able to make with the licensee, holding itself accountable to the plaintiffs only for the standard rentals.

4. That the shares in controversy were received in consideration of the defendant's consent not to carry on the exchange business and are in fact a mode of receiving its share in the profits of the business.

5. The defendant further strenuously maintains that if any doubt exists as to the meaning of the contract, the Master and the Court should consider the previous course of business of the defendant so far as known to the plaintiffs, and the conversations and correspondence of the parties before the conclusion of the agreement, to explain its meaning, and that this evidence clearly shows the meaning of the contract to be such as they contend for.

6. The defendant insists that the plaintiffs by failing to give notice of their claim, during three years, have given a contemporaneous construction to the contract, and that they are besides estopped by laches from making claim for a part of the shares.

7 If profits are to be considered to be rentals or royalties, still the plaintiff should have a fifth part of those profits only which accrue during the seventeen years of this contract, that is, of the dividends earned on the shares in those years.

By the rule, I am required to report my findings of law. It will be difficult to do this, without giving reasons; and, perhaps, impossible to give reasons with arguing the case. Trusting that the Court will make due allowance for this position, I proceed to report.

The contract appears to me to require for its true interpretation an examination of the course of business and other matters relied on by the defendant; and the cases cited in its brief, and which will no doubt be cited to the Court, seem to me to authorize such examination.

Both parties were, in 1879, and before, owners of patents relating to telephones, and both owned some exchanges, but the more usual mode of realizing the profits from their inventions in the United States was to own the telephones and let them out to hire for an annual rent. When the defendant owned the exchanges it charged itself the annual rentals precisely as it did to strangers.

The rentals had come to be nearly uniform for the different classes of business, at about the rates mentioned in the contract. The general course of each company was known to the other.

Many suits were pending in 1879 between the parties, or between one party and a licensee of the other. One suit was by the Bell Company against Dowd, which was defended by the Western Union Company.

The affidavit of Mr. Gifford, counsel of the Western Union Company, proves that after the testimony in the Dowd suit was substantially closed, he became convinced and advised his client that Bell was the first inventor of the telephone, and that Dowd had infringed Bell's patent. At the same time he considered that one of the patents owned by the Western Union Company was of much value as an improvement in transmitters. He advised a compromise but failed to agree on one with the counsel of the defendant, and the parties themselves afterwards made the contract sued on here, which met his approval.

The affidavit was made in 1882, and in it Mr. Gifford uses ex-

pressions which seems to show his opinion to be that the contract gives the plaintiffs a share "in the results of the combined patents," which is the claim now made by the plaintiffs.

On a first reading of the contract it struck me as meaning what the plaintiffs contend for it; but after careful consideration I find the defendant's position more sound.

The "rentals and royalties" which are to be divided, are certain annual sums which are definitely fixed in the contract with a certain latitude for increase or diminution.

The word "royalty" was introduced at Mr. Gifford's instance, and he appears to have attached great importance to it; but in this contract it is used interchangeably with "rental" and cannot be construed to mean anything other than rental.

A license is somewhat like a lease, and it will be found that where a specific sum is to be paid periodically or for each machine or other thing used or made under license from a patentee, it is, and was before 1879, not uncommon to use in licenses the words "rental and royalty", as meaning the same thing.

I find it impossible to construe the words of the contract otherwise.

The equally important question remains, whether the defendant in taking this stock, was violating the true intent of the contract by an evasion, and acquiring something indirectly which it was bound to acquire as rental or royalty.

In this connection I have ventured to inquire whether if there was in the bill a prayer for a reformation of the contract, so as to make it include what the plaintiffs already find in it, that is, a stipulation to divide all the profits of the business, such relief ought to be granted.

It is clear that the exclusive right to do an exchange business was left to the defendant, and I cannot construe this as anything less than the right to the profits of the business, and this whether it carried on the business alone or jointly with others. It was known to the plaintiffs that the defendant, in November, 1879, owned exchanges in Boston and Chicago, and no claim was ever made until the letter of Feb. 26, 1883, for a share in the profits of those exchanges.

It was known to the plaintiffs that in several cases the defendant

had, before Nov. 10, 1877, made short term contracts with a right to buy the plants at the end of the term.

I think it fairly appears by the testimony of Mr. Vail that the plaintiffs knew of the New York contract, made July 3, 1878, page 302, by which stock was to be given to the defendant after a certain time, pages, 110, 121 *et seq.*

It appears by Mr. Forbes' evidence, page 148, and by the correspondence, that a contract made by the parties to this suit with one Ormes, dated Aug. 26, 1879, was the "basis" of the contract in suit. Indeed, this appears from a comparison of the two contracts.

This contract (record page 452) provides that the Western Union Company should receive one dollar (with a minimum of seventy-five cents) for each telephone used by Ormes within a large territory for which he was licensed by both parties, and that the defendant should receive the remainder of the rentals, which would give each of these parties about the same share of the rentals as they now receive.

The now plaintiffs agreed "to withdraw from said territory as competitors in the telephone business, and neither to use, sell, or rent, or license others to use, sell, or rent, telephones to be used in said territory, leaving the field for the use of telephones entirely to the party of the second part and its licensees and agents." Page 455.

The Ormes contract clearly contemplates that the defendant in any one of several contingencies will carry on exchanges or authorize them to be carried on, and that it will then pay the one dollar to the plaintiffs and nothing more.

The meaning of the contract of Nov. 10, 1879, though more shortly expressed, appears to be the same. Licensees and agents are not mentioned in this connection, though corporations interested with the defendant are. I consider the exclusive right to be alienable.

I do not suppose that either party anticipated the great profits which have proved to be obtainable in the exchange business; and I find that the plaintiffs did maintain for a considerable time during the negotiations that they should share in the business. In two of the drafts submitted by the plaintiffs to the defendant, phrases are found which would have this meaning. Neither of these phrases appears in the final and completed contract, which varies from the Ormes contract chiefly in the agreement of the plaintiffs to bear one fifth of

the expenses of litigation and of the purchase of new inventions, though the Ormes contract contained a stipulation that the defendant might increase the rentals until it was repaid the cost of such new inventions.

There is an obvious reason for these changes in that the patents were then united only for a particular territory, and I do not regard them as sufficient to authorize a change of construction, especially as the minimum bonus here is larger than in the Ormes.

No doubt the defendant might have obtained larger rentals for its telephones used in some or perhaps in all of the exchanges in question, if it had chosen to charge them. They would, however, have varied with each exchange according to the size of the city and other circumstances which would affect the probability of profit to the exchange company. The contract, I think, contemplates a regular standard rental substantially alike for each class of business, not to vary with the value of the use in particular cases, as the rental or royalty in which the plaintiffs are to share.

I am of opinion that by the contract the defendant clearly had the exclusive right to carry on the exchange business, alone or jointly with others, and to receive its profits, paying to the plaintiffs twenty per cent. of the stated rentals.

If this be granted, it may still be questioned whether when, in any case, the defendant decides not to carry on the business, but to license a corporation for the purpose, and when it agrees for a share of the profits without putting into the common stock anything but a license to use telephones, the profits may not be considered as rentals for the use of telephones. This point appears to me somewhat less clear than the other.

If that be the fair construction and effect of the contract, the plaintiffs would be entitled to one fifth of the dividends received by the defendants from these shares up to Nov. 1, 1896, the date of the expiration of the contract in controversy. Nor do I think they would be estopped by laches from claiming them. It is argued that the receipt of the shares was open and notorious, and was published in the annual reports of the defendant, all which is true. The argument, then, is, that the value of these shares went to make up the price of the defendant's stock bought in the market.

This argument applies with much less force to the dividends, few of which, I suppose, had been received before the filing of the bill, and one fifth of the probable amount of which for the remainder of the seventeen years would hardly before that time have affected the minds of purchasers of the Bell telephone shares. When the bill was filed the public had notice of the claim.

I do not, however, find that the plaintiffs are entitled to a share of these profits.

The defendant considered that it was selling its exclusive right to carry on the business, and that in whatever way the value of this right was realized, it is the exclusive owner of it; and I so find.

Similar considerations apply to the sums received for licensing the use of lines connecting exchanges with each other. This right was reserved to the defendant and its licensees, and it could sell it, though the mode of expressing the sale was by a license.

The conclusion is that the plaintiffs are not entitled to the account asked for.

I return into court the evidence given before me, with a schedule of certain parts of it which are not printed in the two volumes of the record.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1943.

WESTERN UNION TELEGRAPH COMPANY ET AL.

v.

AMERICAN BELL TELEPHONE COMPANY.

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(43) AFFIDAVIT OF J. M. W. YERRINTON.

[FILED JAN. 23, 1892.]

I, J. M. W. Yerrinton, of Boston on oath depose and say, —

That I am engaged in the business of stenographic reporting and have been largely and constantly so employed in the courts of Massachusetts and elsewhere and otherwise for upwards of thirty-five years.

That I was employed by both parties in the above-entitled cause

to make a stenographic report of the arguments of counsel before the Hon. John Lowell as Master in the cause.

That the opening argument of Mr. Russell was made March 12 and March 13, 1890, and the closing argument of Gen. Swayne on March 14, 1890.

The following extracts from the arguments of Mr. Russell and Gen. Swayne and the statements of counsel during argument are correctly reported as they were spoken.

Mr. Russell said, —

"Now, how is this met? It is met with some cross examination of Mr. Vail. I do not think it in the least affects his direct testimony. But how ought it to be met, if it is not true? Where is Mr. Eldred? Where is Gen. Stager? Where is Dr. Green?

"Mr. SWAYNE. Do you not know Mr. Russell, that with the exception of Dr. Green, and possibly Mr. Eldred, those people are all dead?

"Mr. RUSSELL. All that had anything to do with this matter?

"Mr. SWAYNE. Substantially all.

"Mr. RUSSELL. Is Mr. Merrihew dead?

"Mr. SWAYNE. He testifies; but Dr. White, Mr. Walker, Mr. Gifford, Gen. Stager, the principal actors on our part, — all those who are charged with anything, excepting Dr. Green, — are dead.

"Mr. RUSSELL. The only man to whom I wish to refer, who is dead, is Gen. Stager. I did not know that he was. But Mr. Eldred is not called here. Dr. Green is not dead; he is very living, but he is not called. I think I can guess why he is not called.

"Mr. SWAYNE. Pardon me right there. I will tell you why he is not called — because you did not call him.

"Mr. RUSSELL. Very well. We did not call him to contradict our witnesses. It would be somewhat singular if we had.

"Mr. SWAYNE. No, to confirm your witnesses, if you supposed he would tell the truth."

Again,

"Mr RUSSELL. This is the report of March 29, 1881. I read from page 7: —

"Immediately after the settlement with the Western Union Company, the policy of making only five-year contracts was adopted, in

order that our company could have time to learn the best permanent basis for the relations between the company and its licensees, and to see which of them would prove satisfactory as associates. Many applications are now being made for permanent licenses, and we have begun to give such permanent contracts in places where the business is being prosecuted with energy and success, in exchange for a substantial interest in the stock of the local companies. By pursuing this plan, the company will gradually acquire a large permanent interest in the telephone business throughout the country, so that you will not be dependant upon royalties for a revenue when the patents shall have expired.

"There is a distinct statement by President Forbes to his stockholders that they have taken the very system which is now complained of, and are acquiring a substantial interest in the stock of what are called there 'auxiliary companies'.

"Mr. SWAYNE. We have no objection to it; we only want a share of it.

"Mr. RUSSELL. All right. We will see about that as we go along. I did not suppose you had any; you made none, and that is my point."

"Then on pages 2 and 3 of the report of March 28, 1882: —

"We have, during the year, pursued the policy of giving permanent contracts to our licensees, taking a stock interest in payment. The company can in this way obtain a permanent vested interest in the telephone business independent of its royalty upon telephones.

"In exchanging short contracts for permanent licenses, dividends upon our portion of stock have been waived for periods varying according to the periods of the old contracts. The revenue from this source, for the next two or three years, will, therefore, be moderate; but, after that time, it should rapidly increase, as most of the exchanges promise to have a paying business.

"Now, when it is said that this was a disguise and a collusive contract, I think it goes some way in answer to it to show that just what it was was put before the whole public by printed reports made to the whole stockholding body of the Bell Telephone Company. I do not think we need prove that Dr. Norvin Green knows the reports of the Bell Telephone Company, or that the Western Union, inter-

ested as it is in the business of the corporation, knows what the president says to its stockholders in print by pamphlets distributed over the whole country. It tells the whole story, and it would require a good deal of proof to show that Dr. Green and his associates did not read those reports."

In his closing argument Gen. Swayne said, "It was suggested yesterday that Mr. Gifford is dead; Dr. White is dead; Mr. Walker is dead; (Mr. Eldred went, years ago to Europe with a woman who was not his wife, deserting his family to that end. He has gone since further on along that road whose gate is the house of the strange woman, and when the question was up of putting him upon the stand we were confronted with the fact that we could not ask your Honor to believe him. It was free for the defendants to have called him, subject to our impeachment, had they thought it best.) Two notable exceptions to those general propositions remain. There was one witness naturally to be called on our side, there was one naturally to be called on their side, very prominent, conspicuous actors, each of them. Neither of us called that witness. We might have called Dr. Green. He was an early and a conspicuous actor. He is not dead. Quite on the contrary just now. He has gone to celebrate his golden wedding. That is perhaps as far as I may go. He is upon the Record and to the Record they are cordially welcome. If they wanted him more he was cordially at their service and of quite unimpeachable candor. We did not call him. May I say, — I do not say it as argument, not even as explanation to the Court, only as explanation to the counsel who inquired why we did not call him, — that his letters show that at the time of this contract he was oppressed with work and care. I was one of the unhappy causes of that situation. I know how worried and distressed I was with a small portion of the other side, with one feature of his cares. He remembers simply this beyond what is in the Record, that he was looking out for the Telegraph Company and insisting on the limitation of the transmission of speech, and for the Telegraph Company, and *qua* Telegraph Company; he cared not for the rest. Dr. White, Mr. Clifford, Mr. Walker, could take care of those interests."

The passage alluded to in brackets was not written out by me in

the copy of the report given to the Court, but at request of counsel it was omitted, and these words were inserted in brackets, viz.: (Counsel stated the reason.) The passage as now given is correctly reported as Gen. Swayne uttered it.

J. M. W. YERRINTON.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

BOSTON, Jan. 14, 1892.

Then personally appeared J. M. W. Yerrinton, and made oath that the foregoing affidavit by him subscribed is true.

Before me,

[SEAL] MINER R. THOMAS,
Notary Public.

On said twenty-third day of January, 1892, the following affidavit was filed by the complainants: —

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1743.

WESTERN UNION TELEGRAPH COMPANY ET AL.

v.

AMERICAN BELL TELEPHONE COMPANY.

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(44) AFFIDAVIT OF THOMAS T. ECKERT.

[FILED JAN. 22, 1892.]

I, Thomas T. Eckert, of the city of New York, on oath depose and say, that I am, and have been since 1881, vice-president and general manager of the Western Union Telegraph Company, and have been familiar with the preparation and conduct of this cause.

I further depose and say that the witnesses, Samuel L. Taylor, Theodore N. Vail and William H. Forbes, whose testimony is referred to in the affidavit of John E. Hudson, president of the American Bell Telephone Company, made on the thirteenth day of June,

1891, and filed in opposition to this motion, are all alive and in the United States, or where their testimony can be had, so that there is no danger that the benefit of their testimony would be lost to the defendant in any new suit for the same cause of action as this suit, Samuel M. Taylor being a resident of New Jersey, Theodore N. Vail a resident of New York, though now absent in Europe, and William H. Forbes a resident of Massachusetts, and a large stockholder in, and former president of, the American Bell Telephone Company.

I further depose and say that all the documents, correspondence, letters and exhibits, written or printed, which were produced before the examiner, or which were produced before the master and admitted to be used in evidence in the cause, are, as I am advised and believe, still in existence, and so far as they are in the custody of the plaintiff, they are subject to the examination of, and to be copied by, the defendant at any time, and that there is no danger that the defendant may, by the dismissal of this suit, lose the benefit of any documents, correspondence, letters and exhibits, written or printed, or which have been introduced in evidence in this cause, or of the testimony of any witnesses who were examined therein.

THOMAS T. ECKERT.

STATE OF NEW YORK,
NEW YORK COUNTY, ss.

On Dec. 29, 1891, personally appeared before me Thomas T. Eckert, who deposes that he has read the foregoing affidavit by him subscribed, and that the same is true.

[SEAL] GEO. H. FEARONS,
Notary Public, N. Y. Co.

This cause thereupon came on to be heard by the Court, the Hon. Lebaron B. Colt, Circuit Judge, sitting, on said twenty-third day of January, 1892, upon complainants' petition to dismiss, and was argued by counsel. This cause was thence continued under advisement to the May term of this court, A. D. 1892. On the twenty-third day of May, 1892, the opinion of the Court was announced and in accordance therewith the motion of complainants to dismiss the bill of complaint in this cause without prejudice upon

payment of costs, was granted by the Court, the Hon. Lebaron B. Colt, Circuit Judge, sitting. On the twenty-second day of June, 1892, costs for the defendant were duly taxed at two hundred and fifty-three dollars and fifty-two cents ($253.52) and the following stipulation was filed:

(45) STIPULATION AS TO TENDER OF COSTS, ETC.

[FILED JUNE 22, 1892.]

Payment of the defendant's costs has been tendered by the plaintiff to the defendant and refused by the defendant on the ground that it intends to appeal from any decree dismissing the bill, and, for the purpose of entry of decree dismissing the bill, it is to be assumed that the costs have been paid to the defendant. But this is to be without prejudice to the right of the defendant to subsequently claim payment of the costs as taxed and have execution therefor if it desires.

W. G. RUSSELL,
for Defendant.

On said twenty-second day of June, 1892, the following motion of defendant as to form of decree was filed: —

(46) MOTION OF DEFENDANT AS TOFORM OF DECREE.

[FILED JUNE 22, 1892.]

And now in the above entitled cause before decree entered therein, the defendant, not waiving any objection to any decree whereby the plaintiffs shall be allowed to dismiss their bill without prejudice or any right to appeal therefrom, comes and asks that no such decree be made unless or until the plaintiffs shall file in the cause a stipulation that in any case which may hereafter be brought by the plaintiffs or any of them against the defendant for the same cause of action, or founded upon the contract set forth in the plaintiffs' bill, the defendant shall be entitled to use by reference to the record in this case or by transcript therefrom, any testimony, documents, exhibits or other evidence, competent or admitted in this case by agreement, which were used in the hearing of this case, and any admissions or stipulations made by counsel for the plaintiffs in this cause, as if the same were duly taken, produced or made in such case hereafter

brought; and that such stipulation be required and made part of any such decree.

And the defendant asks to be heard as to the form of any decree to be entered in said cause.

AMERICAN BELL TELEPHONE CO.,
by W. G. RUSSELL,
its Attorney and of Counsel.

On the fifth day of July, 1892, a paper purporting to be the deposition of Samuel M. Taylor in this case, called by the defendants and examined in New York Jan. 10, 1889, was filed by the defendant in the clerk's office. This paper is marked "Original" and is signed by said Taylor. This paper is printed in "Vol. I. Oral Evidence and Documents," returned by the master and filed with his report Aug. 11, 1891, on pages 64 to 98, inclusive, except that, as there printed, the signature of said Taylor does not appear at the end thereof on page 98.

[MEMORANDUM. Upon the suggestion of counsel for the defendant, appellant, I do not include this paper in this Transcript of Record, it already appearing with the papers returned by the master as above stated. ALEX. H. TROWBRIDGE, *Clerk.*]

On said fifth day of July, 1892, the depositions of Theodore N. Vail and William H. Forbes, taken in this case, were filed by the defendant in the clerk's office. These depositions are printed in "Vol. I. Oral Evidence and Documents", returned by the master and filed with his report Aug. 11, 1891, on pages 98 to 161, inclusive.

[MEMORANDUM. Upon the suggestion of Counsel for the defendant, appellant, I do not include these depositions in this Transcript of Record, as they already appear with the papers returned by the master as above stated. ALEX. H. TROWBRIDGE, *Clerk.*]

On said fifth day of July, 1892, a package of papers, marked "Sample Contracts for Mr. Vail's Deposition", was filed by defendant in the clerk's office. The following certificates are attached to said package of papers: —

(47) CERTIFICATE AT THE BEGINNING OF PACKAGE.

CIRCUIT COURT OF THE UNITED STATES.

District of Massachusetts.

In Equity.

Western Union Telegraph Company et al.

v.

American Bell Telephone Company.

I, Charles H. Swan, a Commissioner of said Circuit Court, and examiner in the above entitled cause hereby certify as follows: — The deposition of Theodore N. Vail, a witness for defendants in said cause, was taken before me, under the 67th Equity Rule as amended; as appears from the record, between Interrogatories 4 and 5, certain copies were "furnished as samples of the various forms" of contracts; the annexed papers are the papers so put in evidence, and are now by me returned into court as a part of the deposition of said Vail.

Witness my hand at Boston, this first day of July, 1892.

CHAS. H. SWAN,

Examiner.

(48) CERTIFICATE AT THE END OF PACKAGE.

For convenience, I note with reference to the printing which was done in New York by the complainants, that there are some errors in the markings and notes made to identify the papers, and in some cases variations in the body of the paper. So far as I am aware these variations are not material for the purposes of the present case. The contract of April 30, 1880, called in the Record the "Metropolitan Consolidation", was not printed in complainants' printed book, but a previously printed copy was used before the master, and returned by him, annexed to his report.

In the original deposition the interrogatories were numbered.

At the end of Mr. Vail's deposition the complainants have printed (page 145) a reference to certain "memoranda at close of testimony", and following Mr. Forbes's deposition (page 161) is a note beginning "As the memorandum and correspondence" etc. This note was evidently printed from an incorrect copy of the memorandum. The correct form is as follows: —

"NEW YORK, February 1, 1889.

Counsel for the plaintiffs waive the objection as to the mode of Mr. Forbes's testimony, as intimated in the last sentence of the objections which precede the cross examination.

The first of the writings referred to in the offer of evidence at the close of Mr. Forbes's seventh answer, and all of said writings after July 1, 1879, were put in evidence by copies. The others may be referred to by either party at the hearing before the master, subject to more objections to their legal competency.

The defendants reserve the right, at the hearing before the master, to refer to the charters of the various companies that have owned the Bell patents.

CHAS. H. SWAN.

July 5, 1892."

[MEMORANDUM. Upon the suggestion of counsel for the defendant, appellant, I do not include this package of papers in this Transcript of Record, said counsel stating that he does not suppose the errors and omissions above referred to by Examiner, Charles H. Swan, are material for the purposes of the present appeal, and that, if full and correct copies of these papers in the Appellate Court shall ever be thought material, the American Bell Telephone Company consent that they may be corrected or new copies may be sent up. ALEX. H. TROWBRIDGE, *Clerk.*]

On said fifth day of July, 1892, another package of papers in two parts, marked "A" and "B", were filed by defendant in the clerk's office. The following certificates were attached to said package of papers: —

(49) CERTIFICATE AT THE BEGINNING OF PACKAGE.

CIRCUIT COURT OF THE UNITED STATES.

District of Massachusetts.

In Equity.

Western Union Telegraph Company et al.

v.

American Bell Telephone Company.

I, Charles H. Swan, commissioner of said Circuit Court, and examiner in the above entitled cause, hereby certify as follows: —

The deposition of William H. Forbes, a witness for defendant in said cause, was taken before me under the sixty-seventh Equity Rule as amended; between Ints. 7 and 8, and between Ints. 11 and 12, defendants produced various writings and memoranda; some of them were then formally put into the record, with liberty to complainants to put in all the others if they wished; those then so put into the record constitute the package A; the others which the complainants were at liberty to put into the record, together with a letter from Dr. Green, Feb. 26, 1883, and the answer thereto, constitute the package B; all of said writings were put in evidence by copies; the annexed papers are the papers so put in evidence, and are now by me returned into court as a part of the deposition of said Forbes, excepting the "Outline of Proposed Agreement" which was filed with the master and returned to Court by him.

Witness my hand at Boston, this first day of July, 1892.

CHAS. H. SWAN,

Examiner.

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(50) CERTIFICATE AT THE END OF PACKAGE.

For convenience, I note, with reference to the complainants' print of the papers produced during Mr. Forbes's deposition, that a letter from W. H. Forbes to S. S. White, June 6, (1879) was not printed; a paper headed "Provision for Division of Stock", following "Copy

Memo. sent to Dr. White", was not printed; on page 185 of complainants' print, Vol. 1, "Sec. 975" should be "Scy. G. & S." meaning Secretary of Gold & Stock, and 1879 on same page should be 1878. CHAS. H. SWAN.

JULY 1, 1892.

[MEMORANDUM. Upon the suggestion of counsel for the defendant, appellant, I do not include this package of papers, A and B, in this Transcript of Record, said counsel making a statement with regard to this package similar to that noted in the last memorandum made by me. ALEX. H. TROWBRIDGE, *Clerk.*]

This cause was thence continued to the present October Term of this Court, A. D. 1892.

On the twenty-sixth day of November, 1892, the following stipulation is filed: —

(51) STIPULATION.

[FILED NOV. 26, 1892.]

The complainants pursuant to the decree permitting them to dismiss their bill without prejudice made on the twenty-sixth day of November, 1892, hereby stipulate that, "in any suit which may hereafter be brought by the complainants, or any of them, against the defendant for the same cause of action, the defendant shall be entitled to use any competent testimony, documents, exhibits or other evidence, which were taken or used by it in this suit either by transcript therefrom so far as heretofore printed for use in this case, or otherwise, as if the same were duly taken or produced in such suit hereafter brought, subject to all objections to the competency or materiality thereof, and subject to the right of the complainants to offer from the said record any other portions thereof relating to the same subject matter, subject to all objections to the competency or materiality thereof."

The complainants further agree that this stipulation may be filed by the Clerk as of Nov. 26, 1892, the date of the decree herein referred to.

J. H. BENTON, Jr.,
for Complainants.

On said twenty-sixth day of November, the following final decree is entered by the court, the Honorable Le Baron B. Colt, Circuit Judge, sitting:

(52) FINAL DECREE.

Nov. 26, 1892.

This cause came on to be heard at the May Term, A. D. 1892, of this Court upon the motion of the complainants to dismiss their bill without prejudice upon payment of costs, filed June 1, 1891, and upon consideration thereof the motion was granted on May 23, 1892, upon condition that the complainants file a stipulation that in any suit which may hereafter be brought by the complainants, or any of them, against the defendant for the same cause of action, the defendant shall be entitled to use any competent testimony, documents, exhibits, or other evidence, which were taken or used by it in this suit, either by transcript therefrom, so far as heretofore printed for use in this case, or otherwise, as if the same were duly taken or produced in such suit hereafter brought, subject to all objections to the competency or materiality thereof; and subject to the right of the complainants to offer from the said record any other portions thereof relating to the same subject matter, subject to all objections to the competency or materiality thereof. This cause was thence continued under advisement to this present term, and now, to wit: Nov. 26, 1892, it appearing that such stipulation has been filed, and it appearing by stipulation of the defendant filed in the cause that, for the purpose of entry of decree dismissing the bill, it is to be assumed that the costs have been paid to the defendant;

It is ordered, adjudged and decreed that the bill of complaint herein be dismissed without prejudice.

By the Court,

BENJ. H. BRADLEE,
Deputy Clerk.

On the first day of December, 1892, the defendant files the following petition for appeal, and appeal, and accompanying assignment of errors: —

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1943.

WESTERN UNION TELEGRAPH CO. ET AL.

v.

AMERICAN BELL TELEPHONE CO.

(53) PETITION FOR APPEAL, AND APPEAL.

The defendant herein, the American Bell Telephone Company, believing itself to be aggrieved by the order of said Court herein made on May 23, 1892, granting leave to the complainants to dismiss their bill without prejudice upon payment of costs, and believing itself to be aggrieved by the decision and final decree made Nov. 26, 1892, dismissing the bill herein without prejudice, doth hereby appeal from said decision and decree, to the United States Circuit Court of Appeals for the First Circuit, and prays that this its appeal may be allowed, and that a true transcript of the record and of all the proceedings and papers in said case, including the accompanying assignment of errors, together with a copy of the opinion of the Court filed in said case, may be transmitted to the United States Court of Appeals for the First Circuit; and that a citation be issued to the Western Union Telegraph Company, the American Speaking Telegraph Company, the Gold and Stock Telegraph Company, and the Harmonic Telegraph Company, complainants herein, admonishing and requiring them to be and appear at the said United States Court of Appeals for the First Circuit, in the city of Boston, on the ninth day of January, A. D. 1893, pursuant to said appeal.

AMERICAN BELL TELEPHONE CO.,
by W. G. RUSSELL, *its Attorney.*

(54) ASSIGNMENT OF ERRORS.

The American Bell Telephone Company, defendant, petitioner for an appeal in the foregoing petition, and appellant, hereby assigns the errors which it complains of, asserts and intends to urge, as follows: to wit, that —

1. It appears from the record as follows: The complainants and defendant joined in an agreement filed May 24, 1886, to refer the cause to the Master selected by the parties with the special powers therein stated; they procured to be made and entered the order of reference dated May 28, 1886; both sides took evidence on the merits; they appeared before the Master; in 1890, they laid before him all the evidence theretofore taken in the cause and other proofs relating to the merits; and argued and debated the cause before him at great length, upon the merits; thereupon they submitted the cause to him accordingly; thereafter, on or about Feb. 19, 1891, by a written report, known as a draft report, he reported, published and announced that his "conclusion is that the plaintiffs are not entitled to the account asked for," with other findings, as appears by the record, and on or about said day communicated the same to the parties, all in conformity with said order of reference and in the performance thereof, in the mode and in manner and form as required by law and the rules and practice of courts of equity and of this court, recognized by special agreement of the parties; both sides took notice thereof; they afterwards appeared before him with reference thereto, and both parties asked time to submit objection to said report as required by law and the rules and practice of this court, which time the Master allowed; thereafter the complainants asked leave to introduce new evidence on the merits, which request the Master after argument and upon due consideration refused; thereafter, upon May 7, 1891, the complainants filed to the Master's said report their objections, which appear of record; and the parties discussed and debated the same before the Master; all such discussion and debate went to the correctness of the Master's findings and conclusion; thereafter on June 1, 1891, they first moved for leave to dismiss their bill; there-

after on Aug. 11, 1891, the Master filed his report, before said motion was brought on for hearing.

The defendant and appellant insists and will urge that at the time said motion to dismiss was filed, the Master had made and announced his findings and determination on the merits in the mode, manner, and form required by law and by the practice of courts of equity and of this court, and by the order under and by virtue of which this cause was submitted to him; that by virtue of the acts and proceedings hereinbefore rehearsed, and by virtue of each of them, the defendant, when said motion to dismiss was made, and also at the time the complainants brought it on to be heard, had, and had acquired the right to have the Master's findings, conclusions, determination in the premises, and his report thereof, filed in court, and to have a decree thereon dismissing the bill on the merits unless the report should be set aside for cause shown; and to have such further proceedings take place thereupon as were required by law and by the rules and practice of courts of equity in such cases, until a final decree on the merits should be reached; that the Court erred in not so finding; that the Court erred in allowing the complainants to dismiss their bill without prejudice.

2. The Court erred in finding that the Master had not determined the matters submitted to him before the complainants' motion for leave to dismiss was filed.

3. The Court erred in finding that the Master had not made his report before the complainants' motion for leave to dismiss was filed.

4. The Court erred in finding that the Master had made no findings before the complainants' motion for leave to dismiss was filed.

5. The Court erred in finding that the present case is no different from what it would have been if the complainants had moved to dismiss their bill before reference to the Master, or had moved to dismiss some time during the hearing before the Master, and before the submission of his draft report.

6. The Court should have found and decided that the Master had decided and determined the matters submitted to him, and had made his findings thereon, and had embodied them in a written report, and announced, published, and communicated the same to the parties in manner and form as required by law and the rules and

practice of courts of equity and of this court, and it erred in that it did not find and decide.

7. The Court erred in finding that the complainants were entitled, as of right, to dismiss their bill without prejudice, upon payment of costs.

8. The Court erred in its decision and order of May 23, 1892, granting leave to the complainants to dismiss their bill without prejudice, upon payment of costs, whereas it should have denied the complainants' motion for leave to dismiss, filed June 1, 1891.

9. The Court erred in not ordering that the defendant should have the right to use all the evidence taken in this suit as evidence in any future suit brought by the complainants for the same cause of action, though specially requested by the defendants so to order.

10. The bill, if dismissed at all, should have been dismissed absolutely; and the Court erred in permitting, in ordering, and in decreeing otherwise.

11. The Court erred in its decision and decree of Nov. 26, 1892, in dismissing the bill without prejudice.

AMERICAN BELL TELEPHONE COMPANY,
By W. G. RUSSELL, *Its Attorney.*

Allowed.
LEBARON B. COLT,
Circuit Judge.

On said first day of December, 1892, the defendant gives good and sufficient security that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its appeal good, and said appeal is allowed and a citation is issued thereon returnable in the United States Circuit Court of Appeals for the First Circuit, on the ninth day of January, 1893.

A true record:
Attest: ALEX H. TROWBRIDGE, *Clerk.*

(55) CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, Alexander H. Trowbridge, clerk of the Circuit Court, of the United States for the District of Massachusetts within the First Circuit, certify that the foregoing, together with six packages of accompanying papers, numbered * I. to VI., inclusive, each of said packages being entitled in this cause and further entitled,

PAPERS ACCOMPANYING MASTER'S REPORT, AUG. 11, 1891,

and each containing my certificate of even date herewith, contain and are a true copy of the record in the cause in equity entitled, No. 1943, Equity.

THE WESTERN UNION TELEGRAPH COMPANY ET AL., *Complainants*,
v.
THE AMERICAN BELL TELEPHONE COMPANY, *Defendant*,

in said Circuit Court determined, and that annexed hereto are true copies of the opinion of the Circuit Court, of May 23, 1892, and of the bond to party on appeal, and the original citation on appeal with acknowledgment of service thereon, all constituting a true copy of the record and all proceedings in said cause.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court at Boston, in said district, this ninth day of January, A. D. 1893, and of the Independence of the United States the one hundred and seventeenth.

[SEAL] ALEX H. TROWBRIDGE, *Clerk*.

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* MEMORANDUM. Papers contained in Packages I. to V., inclusive, and numbered 15 to 32 inclusive, are not printed in this record under the "Agreement about Printing", filed in the Circuit Court of Appeals January 25, 1893.

JOHN G. STETSON, *Clerk*.

(56) OPINION OF THE CIRCUIT COURT.

MAY 23, 1892.

COLT, J. This case was heard on motion of complainants to dismiss the bill without prejudice on payment of costs.

On Nov. 16, 1883, the complainants filed the present bill against the defendant, praying for discovery and account, under a certain contract. The defendant answered denying the equities of the bill. The complainants then filed a general replication.

On May 28, 1886, the case was referred to a master by agreement of counsel, and the following order was made by the Court: —

"And now, to wit: May 28, 1886, upon agreement of parties filed, It is ordered that the above named cause be referred to Hon. John Lowell as master to hear the parties and report the facts with such part of the testimony as either party shall request, and his rulings on any questions of law arising in the case."

An examiner was subsequently appointed and testimony was taken by both parties. This evidence was submitted to the master, and oral arguments were made before him by counsel, and printed briefs filed.

At the hearing before the master, it was agreed that prior to the filing of his report, a draft report should be submitted to the counsel, in order that they might present objections thereto.

On Feb. 19, 1890, the master filed a report without having submitted the same to counsel. The next day, upon being reminded of the agreement of counsel, he withdrew the report from the files of the Court, and counsel entered into the following stipulation:

"It is agreed that the paper filed in this case as the master's report shall be taken into his custody and considered as not filed with all accompanying documents."

Thereupon the draft report was returned by the clerk to the master. Thirty days were then allowed by the master to each party to submit objections to the report, and the time was subsequently extended to April 25. Upon that date the complainants applied to the master for time to take further testimony. This application the master refused, and ordered that all objections to the draft report should be made on or before May 7. On that day the complainants made another application to take further evidence, which the

master denied, and ordered that objections to the draft report should then be made. Thereupon objections to the report were filed with the master, the counsel for the complainants filing their objections under protest.

On June 1, the complainants filed their motion to dismiss the bill without prejudice upon payment of costs. On June 3, the complainants requested the master to take no further action, and make no report in the case pending the decision of their motion to dismiss. On Aug. 11 the master filed his report in court with all the evidence and accompanying documents.

Upon the foregoing statement of facts, I do not think there can be any question as to the time when the master's report must be considered as filed. Under the agreement of counsel, and by the subsequent action of the master, no report was actually field until Aug. 11. Whatever was done Feb. 20, with respect to filing the report, was an inadvertence on the part of the master, and can affect in no way the rights or standing of the parties to this suit. In the consideration of this motion I must treat the master's report as not filed until Aug. 11, or more than two months after the filing of complainants' motion to dismiss.

We have, therefore, this single proposition to decide, whether, under these circumstances, the complainants are entitled to dismiss their bill without prejudice upon payment of costs, and this is a question purely of equity practice. It is admitted that under Equity Rule 90, this Court is governed by the equity practice of the High Court of Chancery of England as it existed in 1842, the time of the adoption of the rule. Under that practice, the general rule was that a complainant might dismiss his bill upon the payment of costs at any time before interlocutory or final decree, and this has been the general practice both in the federal and state courts. There are, however, certain well recognized exceptions to this rule, and the question which arises upon this motion is whether the defendant comes within any of these exceptions. These exceptions are based upon the principle that a complainant should not be permitted to dismiss his bill when such action would be prejudicial to the defendant. But this does not mean that it is within the discretion of the court to deny the complainant that privilege under any

circumstances where it might think such dismissal would work a hardship to the defendant, as, for example, where it might burden him with the trouble and annoyance of defending against a second suit, but it means that if during the progress of the case the defendant has acquired some right, or if he seeks or has become entitled to affirmative relief, so that it would work an actual prejudice against him to have the case dismissed, then the complainant will not be permitted to dismiss his bill. To hold otherwise would be to do away with the general rule altogether, and to make the question simply one of discretion on the part of the court.

Where issues are framed out of chancery and decided by a jury, that would be such a determination of the case as to forbid the complainant to dismiss his bill without prejudice, because the defendant has acquired a new right, and so where a master has filed his report and his findings are against the complainant, I do not think for the same reason he should be allowed to dismiss his bill. Again, where the defendant has filed a cross bill, or where he seeks affirmative relief in his answer, or where, without specially asking for affirmative relief in his answer, the evidence discloses that he is entitled to such relief, these are instances where the complainant should not be allowed to dismiss his bill. But where there has been no interlocutory or final decree, and no determination of the cause in any way, and the defendant seeks no affimative relief, or in other words, where the bringing of another suit will merely submit him to the annoyance of a second litigation, the complainant has a right to dismiss his bill without prejudice, upon payment of costs.

Upon the facts presented in this case, I do not think the defendant comes within any of the exceptions to the general rule. It is not contended that the defendant seeks any affirmative relief in this case and therefore that class of exceptions requires no further consideration. The only question is whether there has been any such determination in the case as to confer on the defendant some new right. If the master had filed his report before the motion to dismiss, the situation would have been different, but as the case stood on June 1, 1891, when the complainants filed their motion to dismiss, there had been no determination by the Court or by the master in this cause.

The draft report submitted to counsel by the master was in no sense a determination in the cause. He might have modified or wholly reversed his findings upon the presentation of objections by counsel. Until his ultimate conclusions were embodied in a final report and filed in court, he had in fact legally made no findings, and the present case is no different from what it would have been if the complainants had moved to dismiss their bill before reference to the master, or had moved to dismiss some time during the hearing before the master and before the submission of his draft report.

It seems to me that this case is quite parallel with the leading case of *Carrington* v. *Holly*, 1 Dickens, 280, where the plaintiff filed his bill to establish his right to certain estates, and an issue to a jury was directed. The plaintiff then moved to dismiss his bill with costs, and the defendant applied to have the order granting this motion set aside. Lord Hardwicke said:

"There hath not been any determination. The directing of an issue is merely to satisfy the conscience of the Court prefatory to giving judgment. That issue hath not been tried, and till there hath been a determination, I hold a plaintiff may in any stage of the cause apply to dismiss his bill, upon payment of costs. Had there been a decree, it would have been otherwise. So likewise it would have been, had the issue been tried and a verdict in favor of the defendant."

While it cannot be said that the authorities are entirely harmonious, I think the leading cases in this country and in England support the views herein expressed.

Carrington v. *Holly*, *supra*; *Handford* v. *Storie*, 2 Sim. & Stu. 196; *White* v. *Lord Westmeath*, Beatty, 174; *Curtis* v. *Lloyd*, 4 Mylne & Craig, 194; *Bluck* v. *Colnaghi*, 9 Simons, 411; *Booth* v. *Leycester*, 1 Keen, 247; *Cooper* v. *Lewis*, 2 Phil. 178; *Chicago & Alton R. R. Co.* v. *Union Rolling Mill Co.*, 109 U. S. 702; *Badger* v. *Badger*, 1 Cliff. 237; *American Zylonite Co.* v. *Celluloid Mfg. Co.*, 32 Fed. Rep. 809; *Stevens* v. *Railroads*, 4 Fed. Rep. 97; *Elec. Accumulator Co.* v. *Brush Electric Co.*, 44 Fed. Rep. 602; *Conner* v. *Drake*, 1 Ohio St., 167; *Cozzens* v. *Sisson*, 5 R. I. 489; *Dawson* v. *Amey*, 40 N. J. Eq. 494; *Saylor's Appeal*, 39 Pa. St. 495; *Cummins* v. *Bennett*, 8 Paige, 79; *Vaneman* v. *Fairbrother*, 7 Blackford, 541; *Watt* v. *Crawford*, 11 Paige, 470; *Bul-*

lock v. *Zilley*, 1 Halst. (Ch.) 77; *Babb* v. *Mackey*, 10 Wis. 314; *Seymour* v. *Jerome*, Walker (Ch.) 356.

The motion to dismiss the bill without prejudice upon payment of costs is granted.

Motion granted.

A true copy:

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

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(57) BOND TO PARTY ON APPEAL.

Know all Men by these Presents, That we, The American Bell Telephone Company, a corporation created by the laws of Massachusetts, as principal, and John E. Hudson, a citizen and resident of Boston, Massachusetts, as sureties, are held and firmly bound unto The Western Union Telegraph Company, The American Speaking Telegraph Company, The Gold and Stock Telegraph Company, and The Harmonic Telegraph Company, in the full and just sum of two thousand dollars to be paid to the said Western Union, American Speaking, The Gold and Stock, and The Harmonic Telegraph Companies, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this sixteenth day of December, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, lately, at a Circuit Court of the United States, for the District of Massachusetts, in a suit in equity, depending in said court, between said Western Union, American Speaking, Gold and Stock, and Harmonic Telegraph Companies, as complainants, and said American Bell Telephone Company as defendant, a decree was entered dismissing the said bill therein without prejudice, and the said American Bell Telephone Company having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said complainants, citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the ninth day of January, A. D. 1893.

Now, the condition of the above obligation is such, that, if the said American Bell Telephone Company, appellant, shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make said appeal good, then the above obligation to be void; else to remain in full force and virtue.

THE AMERICAN BELL TELEPHONE CO., [SEAL]
by JOHN E. HUDSON, *President.*

JOHN E. HUDSON. [SEAL]

Sealed and delivered in presence of
GEO. W. LEVERETT
to A. B. T. CO. *and* J. E. H.

Approved: LEBARON B. COLT, *Circuit Judge.*

A true copy:

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

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(58) CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To the Western Union Telegraph Company, the American Speaking Telegraph Company, the Gold and Stock Telegraph Company, and the Harmonic Telegraph Company, all corporations duly established by the laws of the State of New York, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the ninth day of January next, pursuant to an Appeal duly obtained from a decree of the Circuit Court of the United States for the District of Massachusetts wherein the American Bell Telephone Company, a corporation created by the laws of the State of Massachusetts, is appellant, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable LEBARON B. COLT, Judge of the Circuit Court of the United States for the Distrct of Massachusetts, this sixteenth day of December, in the year of our Lord one thousand eight hundred and ninety-two.

LEBARON B. COLT, *Circuit Judge.*

(59) ACKNOWLEDGMENT OF SERVICE OF CITATION.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss. DECEMBER 21, 1892.

Due and legal service of the within citation upon the Western Union Telegraph Company, the American Speaking Telegraph Company, the Gold and Stock Telegraph Company, and the Harmonic Telegraph Company, is hereby accepted, and the Clerk of the Circuit Court of Appeals for the First Circuit is requested to enter my appearance for them upon the entry of the Appeal in that Court.

J. H. BENTON, JR.,
Attorney of Record in the Circuit Court in said Cause.

PAPERS ACCOMPANYING MASTER'S REPORT, AUG. 11, 1891.

[MEMORANDUM. Papers contained in Packages I. to V., inclusive, and numbered 15 to 32, inclusive, are not printed in this record under the "Agreement about Printing," filed in the Circuit Court of Appeals Jan. 25, 1893. JOHN G. STETSON, *Clerk*.]

PACKAGE, NO. VI.

(33) APPLICATION OF COMPLAINANTS TO THE MASTER, APRIL, 25, 1891.

[THIS APPLICATION WAS RETURNED WITH THE MASTER'S REPORT, AND MARKED "A, J. L."]

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MASSACHUSETTS.

THE WESTERN UNION TELEGRAPH COMPANY AND OTHERS,
Complainants.
v.
THE AMERICAN BELL TELEPHONE COMPANY, *Defendant.*

To wit before the HONORABLE JOHN LOWELL, *Master in said cause.*

[THIS APPLICATION WAS PRESENTED APRIL 25, 1891.]

The complainants respectfully ask the Master to allow a reasonable time for the taking in the cause, and hearing before him of further evidence upon the course of business of the parties, or their pre-

decessors in interest, relating to telephone and telephone exchanges, and the methods of realizing profits from patents for inventions, and for the use of telephones, and the knowledge of the parties in respect thereto at and before the time of the execution of the contract of Nov. 10, 1879.

The complainants desire to take testimony in relation to these matters, and particularly that of Dr. Norvin Green, President of the Western Union Telegraph Company, and of Horace H. Eldred. Dr. Green has for some time past been ill and is at this time temporarily at his home in Kentucky for the purpose of recruiting his health and strength. It is expected that he will return to New York within thirty days. The said Eldred is also at this time, and for some time has been ill at Buffalo, New York, but complainants are advised that he is recovering, and is expected to be about again within that time.

By reason of the illness and absence of said parties, the complainants are at this time unable to produce their affidavits containing a formal and particular statement of the facts to which they will depose, but counsel are advised and believe that they can depose to facts which have a material bearing upon the issues in the cause.

For the purpose of making a more formal specification in support of this motion, and a showing of reasons why such testimony was not taken before, they respectfully ask that the Master will allow them the period of thirty days, or so much thereof as they shall reasonably require.

This application is not made for the purpose of delay, but because counsel believe that the interests of justice require that the time asked for should be given for this purpose.

DILLON & SWAYNE, *for Complainants.*

The undersigned, counsel for the complainants, state that they know the contents of the foregoing application; that the same was prepared by them after a full examination of the facts relating to the subject-matter of the said application: that the same is made by their advice in good faith and not for the purpose of delay, but solely in order that justice may be done.

JOHN F. DILLON.
WAGER SWAYNE.

APRIL 21, 1891.

I concur in the above application.

GEO. S. HALE,
Counsel of record for the plaintiff.
J. H. BENTON, JR.,
of Counsel.

[RETURNED INTO COURT, MARKED "B, J. L."]

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY. MAY 1, 1891.

In the case of WESTERN UNION TELEGRAPH CO., *Complainants.*
v.
THE AMERICAN BELL TELEPHONE CO., *Defendant.*

BEFORE THE HONORABLE JOHN LOWELL, TO WHOM SAID CASE HAS BEEN REFERRED AS MASTER.

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(34) COMPLAINANTS' MOTION TO BE ALLOWED TO INTRODUCE OTHER EVIDENCE AND TO BE HEARD ON SAID MOTION AND EVIDENCE.

And now the said complainants come and referring to the application already filed in this case before said Master, in regard to receiving the testimony of Norvin Green and H. H. Eldred, submit the accompanying affidavits, two of said Green marked A and B, and one of said Eldrid marked C, and respectfully pray that said Master would allow said complainants to call said Green and Eldred before him as witnesses, at such time as he shall appoint, or to take their testimony otherwise, and would hear and consider their testimony, and would make and alter his report in this case as justice and equity shall require by reason thereof and of all the competent evidence in said cause, and would grant to said complainants a hearing on said application and with this motion.

And that if he should refuse such hearing, or to grant this

motion, that he would make such affidavits and said application already filed and this motion, with the objections and exceptions of these complainants to such refusals, a part of his report in this cause.

Respectfully reserving the right to add on such hearing of this motion or said testimony, any other and further evidence which they may produce.

DILLON & SWAYNE,
RUSH TAGGART,
JOSIAH H. BENTON, JR.,
GEO. S. HALE,
of Counsel for Complainants,
by G. S. H.

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(35) AFFIDAVIT OF NORVIN GREEN.

[RETURNED INTO COURT, MARKED "C, J. L."]

IN THE UNITED STATES CIRCUIT COURT.

FOR THE DISTRICT OF MASSACHUSETTS.

THE WESTERN UNION TELEGRAPH COMPANY AND OTHERS,
Complainants,
v.
THE AMERICAN BELL TELEPHONE COMPANY, *Defendant.*

STATE OF KENTUCKY,
COUNTY OF JEFFERSON,
CITY OF LOUISVILLE, SS.

AFFIDAVIT No. 1.

NORVIN GREEN, being duly sworn, says that he is President of the Western Union Telegraph Company, and was at and prior to the time of the negotiation of the contract with the National Bell Telephone Company, dated Nov. 10, 1879; that he was present at many of the conferences and negotiations which terminated in the said contract of Nov. 10, 1879; that at none of said conferences, nor in any of the said interviews, was he advised, nor did he have any knowledge of any claim on the part of the said National Bell Telephone Company to a right to accept stock in payment of licenses for the use of telephones; nor was affiant advised, nor did he have any

knowledge, prior to the making of said contract of Nov. 10, 1879, of any practice on the part of the said National Bell Telephone Company of taking stock in exchange companies for licenses for the use of telephones; nor was any contract brought to affiant's notice or knowledge during the course of said negotiations or prior thereto, or prior to the making of said contract of Nov. 10, 1879, providing for the said National Bell Telephone Company's taking stock in such exchange companies licensed to use telephones under the Bell telephone patents, in consideration of licenses for the use of said telephones; nor were any provisions of contracts of that character brought to the attention of affiant at any time prior to the making of said contract of Nov. 10, 1879; nor did the said National Bell Telephone Company make any claim or suggestion to this affiant that any course of business or practice existed in the relations of said Company with its exchange companies whereby said National Bell Telephone Company received stock in such exchange companies in consideration for licenses for the use of telephones licensed under the Bell patents; nor was any such course of business or practice brought to the knowledge or attention of this affiant at any time prior to Nov. 10, 1879. Affiant says further that, subsequent to the making of the said contract of Nov. 10, 1879, he was not advised, nor did he have any knowledge of the making of contracts between the said National Bell Telephone Company or the defendant and its exchange companies, by which the said National Bell Telephone Company or the defendant received stock in exchange for the granting of permanent licenses in lieu of short term licenses, being the class of contracts complained of by the complainant in the above-entitled suit, until a short time prior to the correspondence relating thereto with the said American Bell Telephone Company, copies of which are set forth at pages 233 and 234 of the printed testimony in the above-entitled cause.

NORVIN GREEN.

Sworn to before me this ninth day of May, 1891.

[SEAL] SAMUEL B. CRAIL,
Clerk Circuit Court, Kentucky District.
by M. FLYNN, *D. C.*

IN THE UNITED STATES CIRCUIT COURT,

FOR THE DISTRICT OF MASSACHUSETTS.

THE WESTERN UNION TELEGRAPH COMPANY AND OTHERS,
Complainants,
v.
THE AMERICAN BELL TELEPHONE COMPANY, *Defendant*.

(36) AFFIDAVIT No. 2 OF NORVIN GREEN.

STATE OF KENTUCKY,
COUNTY OF JEFFERSON,
CITY OF LOUISVILLE, ss.

NORVIN GREEN, being duly sworn, says that he is president of the Western Union Telegraph Company, and was at and prior to the time of the negotiation of the contract with the National Bell Telephone Company, dated Nov. 10, 1879; that he was not shown and had not read the testimony of Theodore N. Vail as it appears in the printed evidence and documents in this case. Upon examining said testimony he finds much of it entirely erroneous and misleading. On page 109 (opposite 434) he says: —

"But the Bell Company in consideration of giving up this business reserve to themselves a forty per cent. (40%) profits in the interest of the business."

That interest was represented by stock which the Bell Company held, — forty per cent. (40%) of the stock of the New York Company. As to what percentage of the stock of the New York Company the Bell Company were to have, I had no knowledge, and as the company was stocked into the Metropolitan Company on the basis of the actual valuation of its property, the forty per cent. (40%) referred to was utterly ignored and unknown to the present Metropolitan Telephone and Telegraph Company, which holds the perpetual license for the city of New York and certain surrounding territory. The basis of harmonizing the New York Telephone Company under the Bell license with the New York Company, owned and operated by the Gold and Stock Telegraph Company, and consolidating them into the Metropolitan Telephone and Telegraph Company, was that the capital stock of the Metropolitan Company should

be one million of dollars ($1,000,000), of which the National Bell Company, or parties it should designate, should be entitled to subscribe for and take sixty per cent. (60%) or six hundred thousand dollars ($600.000), and the Gold and Stock Company, or parties it should designate, should be entitled to subscribe for and take forty per cent. (40%) or four hundred thousand dollars ($400,000). On account of these respective subscriptions, the National Bell Licensee Company should be credited with twenty-four per-cent. (24%) or two hundred and forty thousand dollars ($240,000), and the Gold and Stock Company should be entitled to sixteen per cent. (16%) or one hundred and sixty thousand dollars ($160,000) for their respective franchise and good will; these allowances being in a ratio of forty to sixty. The remainder of these respective subscriptions were to be paid in in the actual valuation of the material property of their respective plants, and any balance of either party's subscription to be paid in in cash. Instead, therefore, of being a precedent of allowing the Bell Company the large percentage in stock for its license, it was a precedent acknowledging the right of the Gold and Stock Company to a considerable percentage of such allowance for franchise.

The further testimony of Mr. Vail, as it appears on page 121 and thereafter, referring to the different conversations and discussions had on the subject with Gen. Stager, shows the probability that neither he nor Gen. Stager knew what the basis of final adjustment of conflicting licensees in New York was. Gen. Stager was himself the largest and principal owner of the Gold and Stock Company's Licensee Company in Chicago, and was trying to make, and finally did make, an agreement to consolidate the Chicago competing companies into one and into probably a new company. It was therefore natural and necessary that Mr. Vail and Gen. Stager should discuss this subject and refer to precedents, but not with reference to any interest of the Western Union or Gold and Stock Company in the question. It was not necessary that I should discuss this subject with Mr. Vail, and I have no recollection of ever exchanging a word with him on the question of allowance for permanent licenses, as he says he is quite sure that at some time we did.

NORVIN GREEN.

Sworn to before me this ninth day of May, 1891.

[SEAL] SAML. B. CRAIL,
Clerk Circuit Court Kentucky District,
By M. FLYNN, *D. C.*

(37) AFFIDAVIT OF HORACE H. ELDRED.

[RETURNED INTO COURT, MARKED "**D**, J. L."]

IN THE UNITED STATES CIRCUIT COURT.

FOR THE DISTRICT OF MASSACHUSETTS.

THE WESTERN UNION TELEGRAPH COMPANY AND OTHERS,
Complainants,
v.
THE AMERICAN BELL TELEPHONE COMPANY, *Defendant.*

CITY, COUNTY AND STATE OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss.

HORACE H. ELDRED, being duly sworn, deposes and says: —

That from about the first day of February, in the year 1878, until the fifth day of May, 1879, he was in the employment of the Bell Telephone Company and its successors as its general agent, with headquarters at St. Louis, Mo., for the purpose of locating exchanges and overseeing the construction of the same, and introducing therein the use of telephones licensed under the patents held by that company; that during that time the company had no settled plan for granting exchange licenses, so far as came to the knowledge of this deponent; its policy, so far as known to the deponent, was not so much a question of terms as of being able to occupy the field ahead of the Western Union Telegraph Company; that on the fifth day of May, 1879, he left the service of the National Bell Telephone Company and entered the service of the Western Union Telegraph Company and the Gold and Stock Telegraph Company, and continued in the service of the said last-named companies until the making by said companies of the contract of Nov. 10, 1879, with the National Bell Telephone Company; that prior to his entering the service of said Western Union Telegraph Company and Gold and Stock Telegraph Company,

he had not known of any arrangement made by the said National Bell Telephone Company with any of the exchanges established by it, or by any one in its interest in any part of the country, whereby the said Bell Telephone Company or its successors had obtained any stock in exchange companies in exchange for the use of telephones licensed under the Bell patents; that he had been informed of some exceptional cases in which, for the purpose of introducing the Bell telephones into exchanges competing with the exchanges established by the Western Union Telegraph Company or the Gold and Stock Telegraph Company, the National Bell Telephone Company had attempted to organize companies in which it should take or would have a portion of the stock; but no such attempt, to deponent's knowledge or information, had, up to that time, been successful.

Deponent says further that, after entering the service of the Western Union Telegraph Company and Gold and Stock Telegraph Company, he was engaged in the business of building exchanges and securing locations for exchanges, and pushing the sale or renting of telephones licensed under patents held by the Gold and Stock Telegraph Company, or the Western Union Telegraph Company, and was not informed or advised of the negotiations which ended in the contract of Nov. 10, 1879, until the negotiations were far advanced and a provisional contract drawn.

Deponent says that, during the time he was in the employ of the Western Union Telegraph Company he acquired no additional information as to the course of business thereafter adopted by the said National Bell Telephone Company in dealing with exchange companies using the telephones licensed under the Bell Telephone patents; nor did he have any knowledge of the taking thereafter by the said National Bell Telephone Company of stock in any of the companies using such telephones licensed by it prior to the making of said contract of Nov. 10, 1879.

He says further that, after entering the service of the Western Union Telegraph Company, and the Gold and Stock Telegraph Company, and prior to the making of the contract of Nov. 10, 1879, he did not disclose to the officers of said company any information that he had as to the methods, purposes, plans and course of business of

the said Bell Telephone Company or its successors, relating to its taking stock and stock interests in any telephone exchange companies holding licenses from it, prior to his entering the service of the Western Union Telegraph Company and Gold and Stock Telegraph Company.

Deponent says that his attention was called to this case by a report of the finding of the master herein, Hon. John Lowell; and thereupon he made inquiry, and learned for the first time of the claim presented in the testimony of Mr Vail in this cause, that he had full knowledge of and was familiar with the claimed course of business of the National Bell Telephone Company, in taking stock in exchange companies in exchange for short-term licenses, and that it was claimed that he had knowledge of such practice prior to the making of said contract of Nov. 10, 1879; and thereupon he advised General Eckert of the facts hereinbefore set forth.

HORACE H. ELDRED.

Sworn to before me this 8th day of May, 1891.

WM. J. HARDING,
Notary Public, Kings County, New York.

Certificate filed in New York County.

(Here follows certificate of authority of Notary.)

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(38) EXCEPTIONS FILED WITH THE MASTER.

[RETURNED INTO COURT, MARKED "F, J. L."]

UNITED STATES CIRCUIT COURT,
DISTRICT OF MASSACHUSETTS.

IN EQUITY.

THE WESTERN UNION TELEGRAPH COMPANY AND OTHERS,
Complainants,
v.
THE AMERICAN BELL TELEPHONE COMPANY, *Defendant.*

BEFORE THE HON. JOHN LOWELL, MASTER.

Now come the complainants, and not waiving, but specially insisting upon their right to take and submit further testimony before the

master and in the cause, and to be further heard thereon and upon the draft report, by way of suggestion and exception to the draft of report submitted to counsel by the master, say as part suggestion and exception to said draft report, —

(1) That the Master has, by his draft report, found, as a fact, that the contract requires, for its true interpretation, an examination of the course of business and other matters relied upon by the defendant; whereas the master should have found that the contract did not require for its interpretation any examination of the previous course of business of the parties and other matters relied upon by the defendant; and also that the master should have stated the other matters relied upon by the defendant and requiring examination as bearing upon the interpretation of the contract.

(2) That the Master found that, prior to Nov. 10, 1879, rentals for telephones had come to be nearly uniform, and at about the rates named in the contract, and that the general course of business of each company was known to the other; whereas the Master should have found that the methods of transacting business adopted by the defendant, with respect to its arrangements with telephone exchanges, and the methods adopted by it for receiving compensation for the telephones furnished by it to such exchanges, and the use of its patents, were not known to complainants at and prior to Nov. 10, 1879.

(3) That the Master found and determined that evidence of the previous course of business of the defendant relating to the rental of telephones prior to Nov. 10, 1879, was admissible in this case, and that the same should be considered as bearing upon the construction and interpretation of said contract; whereas the Master should have found and held that evidence as to such previous course of business was inadmissible to affect or vary the interpretation of said contract.

(4) That the Master found that the testimony of Mr. Gifford showed that, after the testimony in the Dowd suit was closed, he became convinced, and advised his client, that Bell was the first inventor of the telephone, and that Dowd had infringed Bell's patent, and thereupon advised a compromise in view of the value of the Western Union patents, but failed to secure the same with the counsel of the

defendant; whereas the Master should have found and determined that the statements as to the Bell patent contained in said affidavit had no relevancy or bearing whatever upon any of the issues in this case, and were wholly immaterial.

(5) That the Master found that the contract of Nov. 10, 1879, required for its full interpretation an examination and consideration of the negotiations conducted by and between the parties thereto prior to the execution of said contract; whereas the Master should have found and held that the said contract did not require for its interpretation the examination of said previous negotiations, and should have held that the evidence of said previous negotiations was wholly inadmissible as evidence in said cause to vary or affect the meaning of said contract.

(6) That the Master found that "the rentals and royalties which are to be divided are certain annual sums which are fixed in the contract, and that the word 'royalty' as used in the contract, is used interchangeably with the word 'rental', and was intended to have, and has in said contract, the same meaning as the term 'rental'. and cannot be construed to mean anything other than 'rental'"; whereas the said Master should have found and held that the word "royalty", as used in said contract, was not used interchangeably with the word "rental", but was intended by the parties to have a different meaning in said contract, and does have a meaning different therefrom, viz., compensation to the defendant for the use of the telephone patents which might be received in a different form than the standard rental named in the contract.

(7) That the Master found that before Nov. 10, 1879, it was common to use in licenses the words "rental and royalty" as meaning the same thing, without stating by whom said words were so used, whether by the defendant or by the complainant, and without finding, if they were so used by the defendant, that the complainant had any knowledge of such use of said words interchangeably and as meaning the same thing, and without stating in what licenses said words were so used; whereas he ought to have found as a matter of fact that said words were not so used, and especially that the word "royalty" was not used in any license granted by either party before the making of said contract.

(8) That the Master found that the exclusive right to do an exchange business was left with the defendant, and that this should be construed as the right to the entire profits of the business, whether it carried on the business alone or jointly with others; whereas the Master should have found that the right to the use of the telephone upon the exchanges only were left with the defendant, and that this did not confer upon the defendant the right indirectly to obtain proffts or results for the uses of the telephones in exchanges, without the right on the part of the complainants to participate in such results to the extent of twenty per cent., as fixed by the contract.

(9) That the Master found that it was known to the complainants that the defendant in November 1879, owned exchanges in Boston and Chicago; whereas the Master should have found that the entire ownership of these exchanges in the defendant, and the defendant's course of business relating thereto prior to Nov. 10, 1879, and subsequent thereto with reference to these exchanges, was not known to the complainants; and that in these cases there was no issue of stock; and no evidence that the defendant made or reported to the complainants any profits other than the annual sum per telephone.

(10) That the Master found that it was known to the complainants that, in several cases before Nov. 10, 1879, the defendant made short-term contracts, with the right to buy the plants at the end of the term; whereas the Master should have found that the proof was not sufficient to establish the fact that the terms of these several contracts authorizing the defendant to buy the plants at the end of the term of the contract, were known to the complainants at and prior to the negotiations of the contract of Nov. 10, 1879.

(11) That the Master found, from the testimony of Mr. Vail, that the complainants knew of the New York contract made July 3, 1878, by which stock was to be given to the defendant after a certain time; whereas the Master should have found and determined that the testimony did not warrant the finding that the complainants knew of the New York contract or of the provision therein contained relating to the issue of stock to the defendant after a certain time.

(12) That the Master found that the Ormes contract, dated Aug. 25, 1879, was the basis of the contract in suit; whereas the Master should have found that the Ormes contract was a separate con-

tract based upon different considerations and relating to particular territory, and specially excepted from and treated by the parties as separate and distinct from the contract of Nov. 10, 1879, and founded upon different considerations.

(13) That the Master found that the meaning of the contract of Nov. 10, 1870, is the same as the Ormes contract, as interpreted and as found by him in the said report; whereas the Master should have found and determined that said Ormes contract is not to be construed or read in connection with the contract of Nov. 10, 1879, as controlling the meaning of the same, and cannot properly be read for the purpose of explaining or varying or ascertaining the meaning and intent of the parties in entering into the said contract of Nov. 10, 1879.

(14) That the Master found that the exclusive right to do an exchange business was alienable; whereas the Master should have found that the exclusive right, as found by him, was not a right except as based upon and given value to by the telephone patents owned by the defendant, and any exchange of such claimed right by the defendant for stock or moneys would be royalties, within the meaning of the contract, for twenty per cent. of which the defendant should account to the complainants herein.

(15) That the Master found that the complainants did maintain for a considerable time during the negotiations that they should share in the profits obtainable in the exchange business, and that, in two of the drafts made by the complainants, phrases are found which should have this meaning; and that the Master found that neither of these phrases appeared in the final, completed contract, which varies from the Ormes contract chiefly in the agreement of the complainants to bear one fifth of the expenses of litigation and of the purchase of new inventions; and that these changes are not sufficient to authorize a change of construction in the contract of Nov. 10, 1879, from the construction given to the Ormes contract of Aug. 25, 1879; whereas the Master should have found that, in the change of language from the drafts having the meaning claimed by the defendants, in the absence of any evidence tending to show that any relinquishment of such right was made by either party, no intention to relinquish the same existed, and that the language in the

contract of Nov. 10, 1879, should be given the meaning that the complainants insist upon, the right to one fifth part of the results obtainable from the use of the telephones in the United States, and that the course of negotiations relating to this matter showed that the parties understood that the defendant was to account to the complainants for the full one fifth of the entire revenue derived from the use of the telephone patents held by the defendant.

(16) That the Master found that the contract contemplated a regular standard rental substantially alike for each class of business and not to vary with the value of the use in particular cases as the "rental" or "royalty" in which the complainants are to share; whereas the Master should have found that the contract of Nov. 10, 1879, provided for a variation in the said rentals at the discretion of the defendant.

(17) That the Master found that, by the said contract, the defendant clearly had the exclusive right to carry on the exchange business alone, or jointly with others, and to receive all the profits resulting therefrom, paying to the complainants twenty per cent. of the said rentals and no more; whereas the Master should have found that the said contract contemplated that the said exchange business would be carried on principally by others than the defendant; and that the defendant's business under the said contract would be renting telephones with a license to use patents covered by said contract of Nov. 10, 1879; and that all the revenues received from the licensing and use of such patents in the exchange business would be shared with the complainants in the proportions fixed by said contract; and that, in the exceptional cases, where the said defendant alone, or jointly with others, held the exchange property such, exchanges should be also rated as paying to the defendant the regular standard rates of rental for the use of such telephone patents.

(18) That the Master found that where the defendant decided not to carry on the business of an exchange, but to license a corporation for the purpose, and agreed with said corporation for a share of the profits, and furnished nothing to the said exchange company but a license to use telephones, and received a fixed rental for said telephones, and also a certain proportion of the stock of said exchange company, that the said stock was not rental or royalty derived from

the use of the telephone patents, but was a portion of the profits of the exchange business which the said defendant was not bound to divide under the said contract with the complainants; whereas the Master should have found that the said stock in each and every case thus received was a rental or royalty received for the use of said telephone patents, and for the one fifth of which the defendant was bound to account to the complainants.

(19) That the Master found that the defendant considered that, in making contracts with its licensees for the exchange of short-term contracts for perpetual licenses and receiving stock in exchange therefor in said exchange companies, it was selling its exclusive right to carry on the exchange business, and that, in whatever way it realized consideration for such exclusive right, it was the owner of it, and was not entitled to account to the complainants for any portion thereof; whereas the Master should have found that the method adopted by the defendant was simply a method of obtaining a large amount of "rental" or "royalty" for the use of telephone patents in which the complainants were entitled to share, and that no exclusive right to do the business of an exchange, or of exchanges existed, or could exist separate and apart from the said telephone patents covered by the contract of Nov. 10, 1879.

(20) That the Master found that the right reserved to the defendant and its licensees of connecting exchanges with each other, authorized the defendant, under form of a license, to use telephones to obtain large revenues therefor which the defendant was not required to share with the complainants: whereas the Master should have found and held that there was no right of value in the connection of exchanges separate and apart from the use of telephones, which the said defendant could alien or sell, and that any sums received therefrom were "rentals" or "royalties" for the use of telephone patents, in which complainants were entitled to share under the said contract of Nov. 10, 1879.

(21) That the Master found that the complainants are not entitled to the account asked for in their bill of complaint herein; whereas the Master should have found, under the testimony and facts adduced in this case, that the complainants are entitled to the account asked for of the defendant and to a decree that the defendant account

to the complainants for one fifth of all the stocks received by the defendant from exchange companies in exchange for perpetual licenses licensing the exchange companies to use telephone patents; and also for one fifth of all sums received on account of licenses for the use of lines and use of telephone patents connecting different exchange systems.

(22) That the Master found that the fund in controversy accrued to the defendant from the sale of its exclusive right to do an exchange business and to take the profits thereof; whereas the Master should should have found that the same accrued to the defendant from licenses granted by it for the use of speaking telephones covered by patents mentioned in the contract of Nov. 10, 1879, and for no other consideration whatever.

(23.) That the Master found that the defendant had a right to do the exchange business; that the same was a valuable right, and that the same was alienable, and that this right existed in the defendant independently of the right to the telephone patents; and that the defendant, when it made a short-term contract licensing the use of speaking telephones under patent, provided for in the contract of Nov. 10, 1879, and reserved to itself the right to assume control of the exchange business at the expiration of such contract, and at or prior to the termination of such contract, in exchange for such right to take possession of such exchange business, gave an exclusive license during the existence of the patents to the exchange company in return for a certain proportion of the stock of such company, was thereby selling to the exchange company its right to do an exchange business; whereas the Master should have found that all shares of stock received by the defendant for such additions were simply received in return for the use of speaking telephones licensed under patents held by the defendant, and should be treated as "rentals" or "royalties" within the meaning of the contract of Nov. 10, 1879.

(24) That the Master found that the course of the defendant, in the cases described in the last preceding suggestion and exception, amounted to an alienation by the defendant of its right to do an exchange business; whereas the Master should have found that, in each and all of the cases of the surrender of short-term licenses and the receiving by exchange companies of perpetual licenses to use

speaking telephones during the existence of such short-term licenses, and after the surrender of such short-term licenses and the receipt of perpetual licenses by the exchange companies, the sole and only consideration furnished by the defendant to such exchange companies for the "standard rentals" received and the stock bonus received by it at the time of the exchange, was the license to use speaking telephones controlled by the telephone patents held by the defendant, in accordance with the provisions of the contract of Nov. 10, 1879.

(25) That the Master found that, considering the evidence as to the previous negotiations of the defendant and the complainants, the true interpretation of the contract of Nov. 10, 1879, was that there was vested in the defendant by that contract an exclusive right to do an exchange business and take all the profits thereof, and that this right was a valuable right, and that the same was alienable; whereas the Master should have found that this provision in the contract of Nov. 10, 1879, related simply and solely to the regulation of the business of the defendant in the transmission of communications, and provided that the telephone, as used by the defendant, should not compete with the business of the complainants in the transmission of messages by telegraph.

(26) That the Master found that the contracts named by Mr. Vail in his testimony, relating to the receipt of stock by the defendant in exchange for licenses, prior to Nov. 10, 1879, were known to the complainants, and constituted the course of business of the defendant prior to Nov. 10, 1879, and they should be taken as controlling in the construction of the contract of Nov. 10, 1879, whereas the Master should have found that the large body of contracts testified to by Mr. Vail and others and offered in evidence in this case containing no such provisions, constituted the course of business of the defendants, and should be considered as controlling in the construction of said contract.

(27) That the Master found that the complainants had knowledge of the previous course of business of the defendant, and that such knowledge was knowledge of the conduct of the defendant, in the cases named in the last above suggestion, in taking stock from licensees for the use of telephones; whereas the Master should have found that knowledge of such previous course of business was

not evidence of any knowledge on the part of the complainants of the act of the defendant in the few cases named of taking stock in exchange for licenses for the use of speaking telephones; and that the said contract of Nov. 10, 1879, was entered into on the part of the complainants without any evidence of knowledge upon their part that the defendant, in the few cases named, received stock in exchange for licenses for the use of telephones, and with knowledge that the general course of business of the defendant, prior to Nov. 10, 1879, had been to receive compensation for the use of telephones only in the shape of money as a rental for telephones; and that the said contract of Nov. 10, 1879, was entered into with the expectation that such general course of business would be continued by the defendant thereunder.

(28) That the Master does not report all the evidence in the said cause; whereas the Master should, comformably to the order in this cause, report to the court all the testimony introduced by either party in this cause, which he is hereby requested to do.

New York, April 24, 1891.

DILLON & SWAYNE,
Complainants' Solicitors.

JOHN F. DILLON,
of Counsel.

J. H. BENTON, Jr.,
of Counsel.

[RETURNED INTO COURT, MARKED "E, J. L."]

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1943.

THE WESTERN UNION TELEGRAPH COMPANY ET AL.
v.
THE AMERICAN BELL TELEPHONE COMPANY.

(39) NOTICE OF PETITION TO DISMISS BILL, ETC.

To the HON. JOHN LOWELL, *Master in said cause:*

The Weston Union Telegraph Company, complainant, represents that on the first day of June, 1891, it filed in said cause a petition

for leave to dismiss its bill, of which a copy was on that day furnished to the Master and to counsel for the defendant.

Wherefore it respectfully asks the Master to take no further action, and to make no report in said cause, pending the decision of said petition, and also to make this paper a part of the proceedings of record before him.

WESTERN UNION TELEGRAPH COMPANY,
By J. H. BENTON, Jr., *Attorney.*

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, Alexander H. Trowbridge, clerk of the Circuit Court of the United States for the District of Massachusetts within the First Circuit, certify that the foregoing are true copies of papers accompanying the Master's report of Aug. 11, 1891, in the cause, entitled,

No. 1,943, Equity.

THE WESTERN UNION TELEGRAPH COMPANY ET AL., *Complainants*,

v.

THE AMERICAN BELL TELEPHONE COMPANY, *Defendant*,

in said Circuit Court determined, and that this certificate is one of the six certificates referred to in my certificate of Jan. 9, 1893, attached to the Transcript of the Record in said cause, as of even date therewith.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said district, this ninth day of January, A. D. 1893, and of the Independence of the United States the one hundred and seventeenth.

[SEAL] ALEX. H. TROWBRIDGE, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 53.

THE AMERICAN BELL TELEPHONE COMPANY, *Defendant; Appellant,*

v.

THE WESTERN UNION TELEGRAPH COMPANY ET AL.

AGREEMENT ABOUT PRINTING.

[FILED JAN. 25, 1893.]

It is agreed that the clerk, in printing the record for the purpose of the present appeal, need not print the papers hereinafter specified. But this is without prejudice to the right of either party to require them to be printed hereafter if that shall become desirable, and without prejudice to the right of either party to refer to them in argument, and to print them if desired or ordered, and without prejudice to the right of the court to inspect them, if it shall think it convenient or shall desire so to do.

The papers hereby referred to are the following :

Papers returned by the Master and named in his schedule.

Vol. 1. "Oral Evidence and Documents", being printed pages numbered in print 1–286, and being numbered as pages 1–286 of "Papers accompanying Master's Report" in the Transcript of Record.

Vol. II. "Contracts", being printed pages numbered in print 287–497, and being numbered as pages 287–497 of "Papers accompanying Master's Report" in the Transcript of Record.

Vol. III. "Order of Reference with some printed matter and an Index", being printed pages numbered in print 499–515, and being numbered as pages 499–515 of "Papers accompanying Master's Report" in the Transcript of Record.

"Affidavit of George Gifford", being four printed pages, numbered as pages 516–519 of "Papers accompanying Master's Report' in the Transcript of Record.

"Outline of Proposed Agreement", being twenty-three typewritten pages, numbered as pages 520–548 of "Papers accompanying Master's Report" in the Transcript of Record.

"Thirty-four type-written contracts", being two hundred and thirty-three pages, bound together, numbered as pages 549–782 of "Papers accompanying Master's Report" in the Transcript of Record.

"Agreement, Gold and Stock Telegraph Co. with Defendant *et al*", being fourteen printed pages of long paper, numbered as pages 783–796 of "Papers accompanying Master's Report" in the Transcript of Record.

"Agreement, East Tennessee Co. with National Bell Telephone Co. *et al*", being twenty-eight contracts in print and type-writing, numbered as pages 797–909 of "Papers accompanying Master's Report" in the Transcript of Record.

"Agreement, Central N. Y. Tel. & Tel. Co. with Bell Co.", type-written, six pages, numbered as pages 910–916 of "Papers accompanying Master's Report" in the Transcript of Record.

"Agreement, Bell Telephone Co. of Buffalo with Defendant", type-written, seven pages, numbered as pages 917–923 of "Papers accompanying Master's Report" in the Transcript of Record.

"Agreement, Ohio Valley Telephone Co. with Defendant", type-written, seven pages, numbered as pages 924–930 of "Papers accompanying Master's Report" in the Transcript of Record.

"Agreement, Colorado Telephone Co. with Defendant", type-written, seven pages, numbered as pages 931–938 of "Papers accompanying Master's Report" in the Transcript of Record.

"Printed Annual Reports of the American Bell Telephone Co.", dated 1881 to 1886, inclusive, bound together, six in all, numbered pages 971-1088 of "Papers accompanying Master's Report" in the Transcript of Record.

"Report of the Oral Arguments before the Master", 362 pages of type-writing, bound together and entitled upon the front cover, — "Papers accompanying Master's Report, Aug. 11, 1891, Package No. V. The Arguments in Type-writing."

W. G. RUSSELL,
for Appellant, AMERICAN BELL TELEPHONE CO.

J. H. BENTON, Jr.,
for WESTERN UNION TELEGRAPH CO., *Appellee*.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1894.

No. 53.

THE AMERICAN BELL TELEPHONE COMPANY

v.

THE WESTERN UNION TELEGRAPH COMPANY ET AL.

DECREE.

JANUARY 2, 1895.

This cause came out to be heard April 13, 1894, upon the transcript of the record of the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, January 2, 1895, ordered, adjudged and decreed by this court as follows:

The decree of the Circuit Court is reversed and the case remanded to that court for further proceedings; opinion to be filed hereafter.

By the Court,

JOHN G. STETSON, *Clerk.*

A true copy:

Attest: JOHN G. STETSON, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1894.

AMERICAN BELL TELEPHONE COMPANY,
DEFENDANT, APPELLANT,
v.
THE WESTERN UNION TELEGRAPH COMPANY,
THE GOLD AND STOCK TELEGRAPH COMPANY,
THE AMERICAN SPEAKING TELEPHONE COMPANY,
THE HARMONIC TELEGRAPH COMPANY,
COMPLAINANTS, APPELLEES.

PETITION FOR REHEARING.

[FILED APRIL 2, 1895.]

And now come the complainants, appellees, before judgment, and ask for a rehearing, and pray for leave to specify and certify the grounds of this petition within a reasonable time after the opinion of the court is filed.

By J. H. BENTON, JR., *Attorney.*

A true copy:

Attest: JOHN G. STETSON, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1894.

No. 53.

THE AMERICAN BELL TELEPHONE COMPANY

v.

THE WESTERN UNION TELEGRAPH COMPANY ET AL.

ORDER OF THE COURT.

SEPTEMBER 3, 1895.

Ordered that the opinion of Judge Webb, passed down, be filed as the opinion of the court.

By the Court,

JOHN G. STETSON, *Clerk.*

A true copy:

Attest: JOHN G. STETSON, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 53. OCTOBER TERM, 1894.

THE AMERICAN BELL TELEPHONE COMPANY,
DEFENDANT, APPELLANT,
v.
THE WESTERN UNION TELEGRAPH COMPANY ET AL.,
COMPLAINANTS, APPELLEES.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE PUTNAM, NELSON AND WEBB, JJ.

OPINION OF THE COURT.

SEPTEMBER 3, 1895.

WEBB, J. The Western Union Telegraph Company, the American Speaking Telephone Company, the Gold and Stock Telegraph Company and the Harmonic Telegraph Company, on and prior to November 10, 1879, owned or claimed to own and control a number of patents issued by the United States, covering and embracing numerous valuable inventions, appliances and methods, useful in the art of transmitting messages by telephone, including the right to transmit call signals by electricity over wires in connection with the telephone business, and they had made many contracts with divers persons, granting licenses for the use of such appliances, methods and inventions, upon payment of certain agreed rentals. At the same time the National Bell Telephone Company owned or claimed to own a number of patents, granted by the United States, covering instruments, inventions and methods, useful and valuable in the art of transmitting messages by telephone; and also claimed the right to transmit by electricity over wires call signals, in connection with its telephone system. And this company, also, had entered into many

contracts with corporations and individuals, granting to such corporations and individuals, in consideration of the payment of certain rentals, the right to use the instruments, inventions and methods, by them owned or claimed to be owned.

On said tenth day of November, 1879, controversy having arisen between the National Bell Telephone Company, on the one side, and the other corporations above named, on the other side, with respect to the rights and powers of each, and of the grantees of each, in the business of transmitting messages by telephone, and litigation as to their respective rights having been initiated by and between the parties, and other burdensome litigation being threatened and probable, the corporations interested entered into negotiations for a settlement and adjustment of all such matters of controversy. Those negotiations resulted in a written agreement and contract between the Western Union Telegraph Company, acting in its own behalf and in behalf of the American Speaking Telephone Company, the Gold and Stock Telegraph Company and the Harmonic Telegraph Company, the complainants in this case, as party of the first part, and the National Bell Telephone Company, as party of the second part, which said agreement and contract in writing was executed, ratified and approved by all the parties.

Since the said tenth day of November, 1879, the National Bell Telephone Company has transferred all its property and rights to the American Bell Telephone Company, a corporation under the laws of the State of Massachusetts, and the said American Bell Telephone Company is made the sole defendant in this suit.

The written agreement between the parties contains a large number of provisions and particulars, which for present purposes do not need to be referred to in detail. It is enough to say that under that contract the defendant became bound and promised to conduct certain business in regard to telephones, letting instruments, granting licenses and other things, for the benefit of all parties to the agreement, upon carefully specified terms, and to collect rentals, render accounts, and to pay over to the others interested a proportion of the moneys collected. The complainants became dissatisfied with the accounts rendered and the amount paid to them, and claimed that under the contract they had an interest in, and a right to an account

of, and a share in, the profit of certain business of the defendant, and that a large amount was due to them, how much they had no means of ascertaining; the defendant, on the other hand, denied that such business was embraced in the contract, and that the complainants were entitled to participate in the profits of the same, and insisted that it had in all respects fully and justly kept and performed all its obligations under the contract.

To enforce their claims, and to compel performance of what they demanded as their due, the complainants have commenced this suit, setting out in their bill the written agreement of November 10, 1879, and praying for a discovery and an account, and for a decree for the sum shown to be due to them.

The American Bell Telephone Company appeared and answered, admitting the contract or agreement, and its obligation to perform all the undertakings of the National Bell Telephone Company under it so made, but not admitting the entire accuracy of the copy of that agreement as set out in the bill of complaint. The defendant in its answer declared that all its said obligations had been promptly, fully and justly performed, and that it had paid to the complainants their full share and proportion of all rentals and profits. It further denied the right of the complainants to any of the relief sought, and it referred to copies of licenses granted to, and of contracts made with, other parties for the transaction of telephone business, also to schedules of all corporations to whom it had granted licenses, or with whom it had made contracts for the use of telephones, but said copies and schedules do not appear to have been in fact filed till during the hearing before the master.

The bill of complaint was filed November 16, 1883; the answer June 30, 1884; and the replication November 19, 1884.

At the May term, 1886, of the Circuit Court, on the twenty-fourth of May, the following agreement was filed:

"Agreement for reference to a master. It is agreed that the above-named cause may be referred to the Hon. John Lowell as master to hear the parties, report the facts, with such part of the testimony as either party shall request, and his rulings on any question of law arising in the case.

W. G. Russell, *for Defendant.*
Dillon & Swayne,
Hale & Walcott, *for Complainants.*'

Thereupon, on May 28, 1886, the following order of court was entered:

"And now, to wit, May 28, 1886, upon agreement of the parties filed, It is ordered that the above cause be referred to Hon. John Lowell as master to hear the parties and report the facts, with such part of the testimony as either party shall request, and his rulings on any question of law arising in the case."

The cause was thence continued to the October term, 1890, when, on February 19, 1891, the master filed his report with accompanying papers, and on the next day the following agreement was filed:

"It is agreed that the paper filed in this case as the master's report shall be taken into his custody and considered not filed (with accompanying documents).

GEO. S. HALE, *for Plaintiff.*
W. G. RUSSELL, *for Defendant.*"

And thereupon the clerk delivered to the said master that report and accompanying papers. This proceeding in his final report, filed August 11, 1891, the master thus explained:

"After I had filed a report in court, the parties reminded me that they had agreed that a draft report should be furnished them for their suggestions before the final report was made and filed. Therefore the report was taken from the files by consent, and several hearings were had before me, and I have in some particulars modified my report accordingly."

The cause was continued to the May term, 1891, of the Circuit Court, and on the first day of June, 1891, the following petition was filed:

"The Western Union Telegraph Company, complainant, showeth that your petitioner, having exhibited its bill in this Honorable Court against the above-named defendant, which has appeared and put in its answer thereto, your petitioner is now advised to dismiss its said bill. Your petitioner therefore prays that the said bill may stand dismissed out of this court without prejudice, but with costs to be taxed by the clerk.

WESTERN UNION TELEGRAPH COMPANY,
by J. H. BENTON, JR., *Attorney.*"

On this motion no action was at once taken. August 11, 1891, the master filed his report with accompanying papers. In it he states that, in June, the counsel for the complainants notified him that they had filed in court a petition to dismiss the bill, and asked him to

make no report pending said petition, but that he considered it his duty to proceed and leave to the court all questions arising out of the petition. October 19, 1891, the following joinder was filed:

"Joinder in motion to dismiss. The American Speaking Telegraph Company, the Gold and Stock Telegraph Company and the Harmonic Telegraph Company join in the petition for leave to dismiss, heretofore filed by the Western Union Telegraph Company.
By J. H. BENTON, JR., *Attorney*."

November 26, 1892, a decree was entered, dismissing the bill of complaint without prejudice upon payment of costs. From this decree the American Bell Telephone Company appealed and duly perfected its appeal.

The single question contested is the right of the complainants thus to dismiss their bill. To the discussion of this question great learning and extensive examination of authorities have been devoted. But in the opinion of this court, the question lies in narrow compass. All the authorities recognize that in the progress of a suit a stage may be reached when the right of the complainant to end the cause by dismissing his bill ceases. With sufficient exactness, the decisive point may be said to be when the cause has proceeded so far as to give the defendant rights of which he would be deprived by allowing the dismissal of the bill by the complainant on his motion.

Such rights were acquired in this cause by the reference of the parties to the master, approved and confirmed by the decretal order of the court. The defendant, by the concurrent force of the stipulation of the parties to refer to the master "to hear the parties, report the facts, and his rulings on any question of law arising in the case", and of the order of court, acquired the right to have the hearing before the master, his report and the decision of the master thereupon. Neither party could at his pleasure revoke or rescind the reference so made and confirmed. Even if the right of the defendant to have the cause go on was not fixed by the stipulation and the order of the court, which is not admitted, it was secured by the hearing before the master pursuant to that stipulation and order, at which the parties produced their evidence at great length, presented their arguments and submitted the case to the master for his determination. But, further than this, the master

reached a decision and communicated it to the parties, or their counsel, before any suggestion by the complainants of a desire to dismiss their bill. It was only after it became known to them that the master's decision was in favor of the defendant and adverse to them, that they sought to escape and to deprive the defendant of the award of a tribunal of mutual selection.

It is not by this meant that the report filed on the nineteenth of February, 1891, and afterwards withdrawn, is regarded as the technical report of the master. But it was a draft report, the contents of which were made known to the parties precedent to the ultimate report solely to give them opportunity to suggest errors, to ask revision and reconsideration, to take exceptions, and to do whatever might be necessary to put them in position to contest the approval and confirmation of the report as finally made. The record shows that some of those steps were taken before any motion to dismiss was filed: that, after the draft report was submitted and read to counsel at his office, and at the complainants' request, thirty days were allowed by the master for each party to submit objections or suggestions for alterations of said report, which time was several times further extended at the request of the plaintiffs' counsel; and some time near May 7, the counsel of both sides filed and presented to the master their respective objections and suggestions, and, before the motion to dismiss the bill, counsel on each side filed with the master their reply to the objections and suggestions of the other.

No dissent is made from the view of the Circuit Court that the master's report cannot be deemed to have been filed till after the petition for leave to dismiss was made by the Western Union Telegraph Company, nor is any account made of the point that in form one only of the complainants signed that petition. The decision is that at the time the motion was made the complainants had not the right to dismiss their bill.

Upon the effect of a reference like that in this case, see *Kimberly* v. *Arms*, 129 U. S. 513, *Davis* v. *Schwartz*, 155 U. S. 631–637.

A true copy:

Attest: JOHN G. STETSON, *Clerk*.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

AMERICAN BELL TELEPHONE COMPANY,
DEFENDANT, APPELLANT,
v.
THE WESTERN UNION TELEGRAPH COMPANY,
THE GOLD AND STOCK TELEGRAPH COMPANY,
THE AMERICAN SPEAKING TELEPHONE COMPANY,
THE HARMONIC TELEGRAPH COMPANY,
COMPLAINANTS, APPELLEES.

WITHDRAWAL OF PETITION FOR REHEARING.

[FILED NOV. 12, 1895, BY LEAVE OF COURT, AND ALLOWED.]

And now come the complainants, appellees, and withdraw their petition for rehearing, filed April 2, 1895.

By J. H. BENTON, JR., *Attorney.*

A true copy:

Attest: JOHN G. STETSON, *Clerk.*

CLERK'S CERTIFICATE.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

I, John G. Stetson, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages, numbered 1 to 197, inclusive, hereto prefixed, contain and are a true copy of the record (excepting the papers returned by the master and contained in packages I. to V., inclusive, omitted in printing the record for the hearing in the United States Circuit Court of Appeals for the First Circuit, under the "Agreement about Printing", on pages 198 and 199), and all proceedings in a cause lately determined in the Circuit Court of the United States for the District of Massachusetts, entitled,

No. 1943, Equity.

THE WESTERN UNION TELEGRAPH COMPANY ET AL, *Complainants*,

v.

THE AMERICAN BELL TELEPHONE COMPANY, *Defendant*,

as a transcript of the record thereof of said Circuit Court was transmitted to the United States Circuit Court of Appeals for the First Circuit upon the appeal of the said defendant from the final decree of said Circuit Court in said cause to said United States Circuit Court of Appeals for the First Circuit.

I further certify that said pages 2 to 197, inclusive, contain and are a true copy of the whole record (excepting the papers returned by the master, and omitted in printing under the "Agreement about Printing" on pages 198 and 199) of said Circuit Court upon which said appeal, entitled,

No. 53.

THE AMERICAN BELL TELEPHONE COMPANY

v.

THE WESTERN UNION TELEGRAPH COMPANY ET AL.,

was heard in said United States Circuit Court of Appeals for the First Circuit, April 13, 1894.

I further certify that pages 198 to 210, inclusive, contain and are true and attested copies of papers filed and of orders and decrees

entered in the United States Circuit Court of Appeals for the First Circuit subsequently to the filing of the transcript of record of said Circuit Court of the United States for the District of Massachusetts, January 9, 1893, namely:

(1) Agreement as to Printing, filed January 25, 1893, pages 198 and 199.

(2) Decree, January 2, 1895, page 201.

(3) Petition of Appellees for Rehearing, filed April 2, 1895. page 202.

(4) Order of Court, September 3, 1895, that opinion of Judge Webb be filed as the opinion of the Court, page 203.

(5) Opinion of the Court, September 3, 1895, pages 204 to 209, inclusive.

(6) Withdrawal of Petition for Rehearing, filed and allowed November 12, 1895, page 210.

I further certify that said transcript of record of the Circuit Court of the United States for the District of Massachusetts, and said agreement as to printing, decree, petition, order of court and opinion, remain on file and of record in said United States Circuit Court of Appeals for the First Circuit, and that pages 2 to 210, inclusive, containing true copies thereof, with page 1, containing appearances of counsel, contain and are a true copy of the record and all proceedings in said cause in said United States Circuit Court of Appeals, to and including November 13, 1895, and that a mandate has not been ordered to issue.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this thirteenth day of November, 1895.

[SEAL] John G. Stetson,

Clerk.

SUPREME COURT, U. S.
MAR 2 1896
CLERK.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

IN THE MATTER OF THE PETITION

OF

THE WESTERN UNION TELEGRAPH COMPANY,
THE AMERICAN SPEAKING TELEPHONE COMPANY,
THE GOLD AND STOCK TELEGRAPH COMPANY,
AND
THE HARMONIC TELEGRAPH COMPANY,

FOR

WRIT OF CERTIORARI.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO CERTIFY TO THE SUPREME COURT, FOR ITS REVIEW AND DETERMINATION, THE CASE OF "THE AMERICAN BELL TELEPHONE COMPANY, DEFENDANT, APPELLANT, AGAINST THE WESTERN UNION TELEGRAPH COMPANY, THE AMERICAN SPEAKING TELEPHONE COMPANY, THE GOLD AND STOCK TELEGRAPH COMPANY, AND THE HARMONIC TELEGRAPH COMPANY, COMPLAINANTS, APPELLEES."

J. H. BENTON, JR.,
J. F. DILLON,
Counsel for Petitioners.

Supreme Court of the United States,

OCTOBER TERM, 1895.

In the Matter of the Petition of THE WESTERN UNION TELEGRAPH COMPANY, THE AMERICAN SPEAKING TELEPHONE COMPANY, THE GOLD AND STOCK TELEGRAPH COMPANY, and THE HARMONIC TELEGRAPH COMPANY, for Writ of Certiorari.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO CERTIFY TO THE SUPREME COURT, FOR ITS REVIEW AND DETERMINATION, THE CASE OF "THE AMERICAN BELL TELEPHONE COMPANY, DEFENDANT, APPELLANT, AGAINST THE WESTERN UNION TELEGRAPH COMPANY, THE AMERICAN SPEAKING TELEPHONE COMPANY, THE GOLD AND STOCK TELEGRAPH COMPANY, AND THE HARMONIC TELEGRAPH COMPANY, COMPLAINANTS, APPELLEES."

To the Supreme Court of the United States:

The petitioners above named respectfully represent as follows: —

On the sixteenth day of November, 1883, the Western Union Telegraph Company and others, petitioners, above named, filed their bill of complaint in the Circuit Court of the United States for the first circuit within and for the district of Massachusetts, against the American Bell Telephone Company, praying for an account of certain royalties claimed to be due them from the American Bell Telephone Company

under a certain contract, the aggregate amount of which is unknown to them without such account by the telephone company, and cannot be accurately stated by the petitioners, but which, as they have reason to believe and do believe, is at least five millions of dollars.

Thereafter the complainants, these petitioners, moved the Circuit Court for leave to dismiss their bill without prejudice, and on the twenty-sixth day of November, 1892, it was ordered, adjudged, and decreed by the Circuit Court that the bill of complaint be dismissed without prejudice.

From this decree of the Circuit Court the American Bell Telephone Company, defendant, appealed to the United States Circuit Court of Appeals for the first circuit, and its appeal was duly entered in said Court of Appeals on the ninth day of January, 1893; and thereafterwards, upon proceedings had in said cause in said Circuit Court of Appeals, it was, on the second day of January, 1895, ordered, adjudged, and decreed by said Court of Appeals that the decree of the Circuit Court be reversed, and the case remanded to that court for further proceedings, opinion to be filed thereafter. And on the third day of September, 1895, it was ordered that the opinion of one of the judges of said court be then filed as the opinion of the court.

No mandate has been issued by said Circuit Court of Appeals, or further proceedings had by it in said cause.

All the matters and things above set forth appear and are shown at length by a duly certified transcript of the record and proceedings in said Circuit Court of Appeals herewith filed, and to which the petitioners beg leave to refer in like manner as though the same were stated at length in this petition. And the petitioners say that the question arising upon said motion involved only the construction of rule 90 of this court and of the true practice thereunder, and that

upon the true construction of said rule and practice the decision of the Circuit Court allowing them to dismiss their bill without prejudice was right, and that the decision of the Circuit Court of Appeals that the decree of the Circuit Court be reversed was an erroneous construction of said rule of this court and of the true practice thereunder.

The petitioners further say that the Circuit Court of Appeals based its decision upon the construction of the opinion of this court in the case of *Kimberly* v. *Arms*, 129 U.S. 512 (Transcript of Record, p. 210), which, as the petitioners say, is erroneous in that it assumes that the reference in this case was like that in the case of Kimberly against Arms; whereas your petitioners say that an examination of the agreement for reference in this case (Transcript of Record, p. 206) will show that this reference was essentially different from the reference in *Kimberly* v. *Arms*.

In *Kimberly* v. *Arms* the order was as follows: —

> "By consent and request of all the parties herein, it is ordered by the court that Hon. Richard D. Harrison be and is hereby appointed a special master herein to hear the evidence and decide all the issues between the parties, and make his report to this court, separately stating his findings of law and fact, together with all the evidence introduced before him, which evidence shall thereby become a part of the report, which report shall be subject to like exceptions as other reports of masters.
>
> "It is further ordered by like consent and request that said master shall proceed upon twenty days' notice from either party to hear and determine said issues, and with full power and authority to grant such adjournments, amendments, exceptions, and motions as might be granted by the court if the trial was by the court."

In this case the order of reference was as follows: —

> "And now, to wit, May 28, 1886, upon agreement of parties filed, it is ordered that the above-named cause be referred to Hon. John Lowell as master, to hear the parties and report the facts, with such part of the testimony as either party shall request, and his rulings on any questions of law arising in the case."

Transcript of Record, p. 80.

And the petitioners say that in this case the order of reference did not clothe the master with any greater power than is given by the ordinary reference of a cause to a master for advice; and that it did not authorize the master to decide all the issues in the cause, or to determine any issue therein, as was the case in *Kimberly* v. *Arms*.

In that case the master was practically a referee, with power to decide all the issues between the parties, and to grant amendments, exceptions, and motions, as might be granted by the court.

In this case the master was simply authorized to report the facts and the testimony, with any rulings he might make upon any question of law.

The petitioners further show that the jurisdiction of said Circuit Court of said suit by these petitioners against the American Bell Telephone Company was based on the citizenship of the parties, the petitioners being citizens and residents of the state of New York, and the American Bell Telephone Company being a citizen and resident of the state of Massachusetts.

See Transcript of Record, pp. 2, 3, 4.

Wherefore the decision of said Circuit Court of Appeals

in said case is final, and no writ of error lies to said court to bring such case before this court for its review and determination.

But, inasmuch as, by section 6 of the act of Congress of March 3, 1891, creating the Circuit Court of Appeals, this court may in such a case issue a writ of certiorari to bring the case and the record and proceedings therein before this court for its review and determination, with the same power and authority as if the case were brought here by writ of error, *therefore* your petitioners, upon the grounds and reasons appearing in the transcript of the record and proceedings in said cause herewith filed, and for grounds and reasons set forth in the brief in support of this petition herewith submitted, respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the Circuit Court of Appeals for the first circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals in the said case therein, entitled "The American Bell Telephone Company, Defendant, Appellant, against the Western Union Telegraph Company *et al.*, Complainants, Appellees. No. 53," to the end that the said cause may be reviewed and determined by this court, as provided in section six of the act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and to regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891; or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the

said case, and every part thereof, may be reversed by this court.

THE WESTERN UNION TELEGRAPH COMPANY,
THE AMERICAN SPEAKING TELEPHONE COMPANY,
THE GOLD AND STOCK TELEGRAPH COMPANY,
THE HARMONIC TELEGRAPH COMPANY.

By J. H. Benton Jr.,
their Attorney.

Office Supreme Court, U. S.
FILED.
MAR 12 1897
JAMES H. McKENNEY,
CLERK.

166-721

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

IN THE MATTER OF THE APPLICATION OF THE WESTERN UNION TELEGRAPH COMPANY AND OTHERS FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO CERTIFY TO THE SUPREME COURT THE CASE OF THE AMERICAN BELL TELEPHONE COMPANY, DEFENDANT, APPELLANT, AGAINST THE WESTERN UNION TELEGRAPH COMPANY AND OTHERS, COMPLAINANTS, APPELLEES.

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

JOHN F. DILLON,
J. H. BENTON, JR.,
of Counsel for
WESTERN UNION TELEGRAPH CO.

Supreme Court of the United States,

OCTOBER TERM, 1895.

IN THE MATTER OF THE APPLICATION OF THE WESTERN UNION TELEGRAPH COMPANY AND OTHERS FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO CERTIFY TO THE SUPREME COURT THE CASE OF THE AMERICAN BELL TELEPHONE COMPANY, DEFENDANT, APPELLANT, AGAINST THE WESTERN UNION TELEGRAPH COMPANY AND OTHERS, COMPLAINANTS, APPELLEES.

Brief in Support of Application for Certiorari.

Statement of the Case.

A duly certified transcript of the record and proceedings in the Circuit Court of Appeals is submitted with this petition, and from that transcript the following facts appear: —

November 16, 1883, the Western Union Telegraph Company and the American Speaking Telegraph Company, the Gold & Stock Telegraph Company, and the Harmonic Telegraph Company filed the bill in this cause against the American Bell Telephone Company, praying for answer under oath, and for discovery and account as to the transactions of the American Bell Telephone Company under a certain contract made on the tenth day of November, 1879, by the Western Union Telegraph Company, for itself and the

other complainants, with the National Bell Telephone Company (of which the American Bell Telephone Company is the successor).

June 30, 1884, the defendant filed its answer under oath, admitting the agreement, and that the plaintiff was authorized to represent each of the other plaintiffs in making the agreement, but denying the equity of the bill, and the complainants' right to discovery and account as prayed for therein.

November 19, 1884, a general replication was filed by the complainants.

Copy, Record, pp. 2–78.

May 24, 1886, the following agreement, signed by counsel, was filed: —

> "It is agreed that the above-named cause may be referred to the Hon. John Lowell as master to hear the parties, report the facts, with such part of the testimony as either party shall request, and his rulings on any question of law arising in the case."

Copy, Record, p. 79.

May 28, 1886, the following order was made by court: —

> "And now, to wit, May 28, 1886, upon agreement of parties filed, it is ordered that the above-named cause be referred to Hon. John Lowell as master to hear the parties and report the facts, with such part of the testimony as either party shall request, and his rulings on any questions of law arising in the case."

Copy, Record, p. 80.

November 7, 1887, an agreement was made for the appointment of George F. Betts, United States commissioner, as examiner.

November 16, 1887, George F. Betts was appointed examiner by order of court, upon agreement of all parties.

Copy, Record, p. 80.

May 29, 1890, schedules and exhibits of defendant's answer were filed.

Copy, Record, p. 81.

Oral testimony was taken by both parties, to the extent of one hundred and sixty-two printed pages; and documentary evidence, consisting of printed contracts, letters, telegrams, and other documents, was put in before the examiner and the master, amounting to several hundred pages; and other exhibits were made a part of the testimony by stipulation and reference. All the oral testimony, and the larger part of the documentary evidence, were produced before the master who heard the case and the arguments of counsel, the arguments being both oral and printed.

At the hearing before the master it was agreed by counsel and assented to by the master that, prior to the filing of the report, a draft report should be submitted by the master to the counsel, in order that they might present objections thereto, or suggestions for any amendments thereof.

Copy, Record, pp. 135, 136.

February 19, 1891, the master filed a report, with certain accompanying papers, without having submitted the same to counsel in accordance with the agreement above stated.

Copy, Record, p. 122–135.

February 20, 1891, the master, upon being reminded of such agreement by counsel, withdrew the report and all accompanying documents from the files, the counsel on both sides assenting thereto by an agreement filed in the cause in the following form: —

"CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

FEB. 20, 1891.

WESTERN UNION TELEGRAPH COMPANY

v.

AMERICAN BELL TELEPHONE COMPANY.

It is agreed that the paper, filed in this case as the Master's Report, shall be taken into his custody and considered as not filed (with all accompanying documents).

GEORGE S. HALE,
for Plaintiffs.

WM. G. RUSSELL,
for Defendant."

Thereupon the draft report and all the accompanying schedules and documents were returned by the clerk to the master.

Copy, Record, p. 122.

Thereafter, several hearings were had before the master.

Copy, Record, p. 136.

April 25, 1891, the complainants presented to the master the following application: —

"IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF MASSACHUSETTS.

THE WESTERN UNION TELEGRAPH CO. ET AL., *Complainants*,

v.

THE AMERICAN BELL TELEPHONE CO., *Defendant*.

To wit, before the Hon. John Lowell, master in said cause. The complainants respectfully ask the master to allow a reasonable time for the taking in the cause and hearing before him of further evidence upon the course of business of the parties or their predecessors in interest relating to telephones and telephone exchanges and the method of realizing profits from patents for inventions and for the use of telephones, and the knowledge of the parties in respect thereto at and before the time of the execution of the contract of Nov. 10, 1879.

The complainants desire to take testimony in relation to these matters and particularly that of Dr. Norvin Green president of the Western Union Telegraph Company, and of Horace H. Eldred. Dr. Green has for some time past been ill, and is at this time temporarily at his home in Kentucky for the purpose of recruiting his health and strength. It is expected that he will return to New York within thirty days. The said Eldred is also at this time, and for some time has been, ill at Buffalo, New York, but complainants are advised that he is recovering and is expected to be about again within that time.

By reason of the illness and absence of said parties, the complainants are at this time unable to produce their affidavits containing a formal and particular statement

of the facts to which they will depose, but counsel are advised and believe that they can depose to facts which have a material bearing upon the issues in the cause.

For the purpose of making a more formal specification in support of this motion, and a showing of reasons why such testimony was not before taken, they respectfully ask that the master will allow them the period of thirty days, or so much thereof as they shall reasonably require.

This application is not made for the purpose of delay, but because counsel believe that the interests of justice require that the time asked for should be given for this purpose.

DILLON & SWAYNE,
for Complainants."

The undersigned, counsel for complainants, state that they know the contents of the foregoing application; that the same was prepared by them after a full examination of the facts relating to the subject matter of the said application; that the same is made by their advice, in good faith, and not for the purpose of delay, but solely in order that justice may be done.

JOHN F. DILLON.
WAGER SWAYNE.

I concur in the above application.

GEO. S. HALE,
Counsel of Record for the Plaintiff.

J. H. BENTON, Jr.,
Of Counsel."

Copy, Record, pp. 136, 178, 180.

The master refused this application.

Copy, Record, p. 136.

May 7, 1891, the complainants submitted to the master the following request and accompanying affidavits: —

"CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

MAY 7, 1891.

IN THE CASE OF THE

WESTERN UNION TELEGRAPH CO., *Complainants*,
v.
THE AMERICAN BELL TELEPHONE CO., *Defendant*. } IN EQUITY.

Before the Honorable John Lowell, to whom said case has been referred as master.

Complainants' motion to be allowed to introduce other evidence, and to be heard on said motion and evidence.

And now the said complainants come, and, referring to the application already filed in this case before said master in regard to receiving the testimony of Norvin Green and H. H. Eldred, submit the accompanying affidavits, two of said Green marked 'A' and 'B,' and one of said Eldred marked 'C,' and respectfully pray that said master would allow said complainants to call said Green and Eldred before him as witnesses, at such time as he shall appoint, or to take their testimony otherwise, and would hear and consider their testimony, and would make and alter his report in this case as justice and equity shall require by reason thereof and of all the competent evidence in said cause, and would grant

to said complainants a hearing on said application and this motion.

And, that, if he should refuse such hearing or to grant this motion, that he would make such affidavits and said application already filed, and this motion, with the objections and exceptions of these complainants to such refusals, a part of his report in this cause.

Respectfully reserving the right to add on such hearing of this motion or said testimony any other and further evidence which they may produce.

By DILLON & SWAYNE,
RUSH TAGGART,
J. H. BENTON, JR.,
GEO. S. HALE,
of Counsel for Complainants."

The master refused this application.

Copy, Record, p. 136.

Thereupon, on that day, objections and suggestions as to the draft report were filed with the master by counsel for the complainants and defendant, the counsel for the complainants filing theirs under protest.

Copy, Record, pp. 187, 188, 196.

June 1, 1891, the Western Union Telegraph Company, complainant in interest, filed in court the following petition, and the other nominal complainants of record joined therein before it was heard: —

"CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

THE WESTERN UNION TELEGRAPH COMPANY
v.
THE AMERICAN BELL TELEPHONE COMPANY. } IN EQUITY.

PETITION FOR LEAVE TO DISMISS WITHOUT PREJUDICE.

The Western Union Telegraph Company, complainant, showeth that your petitioner having exhibited its bill in this honorable court against the above-named defendant, which has appeared and put in its answer thereto, your petitioner is now advised to dismiss its said bill. Your petitioner therefore humbly prays that the said bill may stand dismissed out of this court without prejudice, but with costs to be taxed by the clerk.

WESTERN UNION TELEGRAPH COMPANY,
By J. H. BENTON, JR., *Attorney.*"

Copy, Record, pp. 122–139.

June 3, 1891, the complainant delivered to the master the following request: —

"CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

THE WESTERN UNION TELEGRAPH COMPANY ET AL.
v.
THE AMERICAN BELL TELEPHONE COMPANY. } IN EQUITY.

To the Honorable JOHN LOWELL, *Master in said cause:*

The Western Union Telegraph Company, complain-

ant, represents that on the first day of June, 1891, it filed in said cause a petition for leave to dismiss its bill, of which a copy was on that day furnished to the master and counsel for the defendant.

Wherefore it respectfully asks the master to take no further action and make no report in said cause pending the decision of said petition, and also to make this paper a part of the proceedings of record before him.

WESTERN UNION TELEGRAPH COMPANY,
By J. H. BENTON, JR., *Attorney.*"

Copy, Record, pp. 136–196, 197.

August 11, 1891, the master, disregarding this request, filed his report, with all the evidence taken and put in before him, and certain papers mentioned in the report.

Copy, Record, p. 123.

The draft report of the master, inadvertently filed by him as a report on February 19, 1890, and on the next day taken from the files, and thereafter, by agreement of parties, treated as a draft report only, made certain findings of fact and rulings of law, including a ruling that the complainant was not entitled to an account as prayed for.

The report filed on August 11, 1891, also finds that the complainant is not entitled to an account, but its other findings and rulings are in many essential particulars not the same as those of the draft report.

Copy, Record, p. 136.

The important statement in the report filed August 11, and found on page 129 of the record, that —

> "As to the fact contended for . . . that the word 'royalty' was not used in the contracts or licenses of the defendant before November 10, 1879, I find that all the very many (185) contracts were open to the inspection of the plaintiffs, and certain of them were admitted to be fair samples of the whole, and are in the case. In none of these, that I can find, is the word 'royalty' used before November 10, 1879; and I consider it a proper inference that it was not so used," —

was not in the draft report.

Copy, Record, pp. 129, 149.

Again, the statement of the defendant's contention that —

> "Correspondence, and other evidence of the nature objected to, was read by the plaintiffs' counsel in opening their case, without objection, and that after this, the objection to the remainder of that evidence comes too late," —

found in the report filed August 11, and appearing on page 129 of the record, was not in the draft report.

Copy, Record, 129, 149.

Again, the statements made in argument, which the defendant claimed were important as made by the plaintiffs' counsel in opening their case, and which are reported by the report filed August 11 (which reports all the arguments before the master), are not referred to or reported by the master in the draft report.

Copy, Record, pp. 135, 154.

The draft report simply reported the evidence, with a schedule of certain parts of it which were not printed.

The report filed August 11 reported the evidence and documents and exhibits, and five volumes of typewritten argument.

Copy, Record, p. 136.

The two reports differ in other matters which are, perhaps, not so material as these, but which, as they were matters of contention before the master, were doubtless considered by each party to be material to the cause.

November 26, 1892, the Circuit Court entered a final decree as follows: —

> "This cause came on to be heard at the May term A.D. 1892, of this court upon the motion of the complainants to dismiss their bill without prejudice upon payment of costs, filed June 1, 1891, and upon consideration thereof the motion was granted on May 23, 1892, upon condition that the complainants file a stipulation that in any suit which may hereafter be brought by the complainants, or any of them, against the defendant for the same cause of action, the defendant shall be entitled to use any competent testimony, documents, exhibits, or other evidence, which were taken or used by it in this suit, either by transcript therefrom, so far as heretofore printed for use in this case, or otherwise, as if the same were duly taken or produced in such suit hereafter brought, subject to all objections to the competency or materiality thereof; and subject to the right of the complainants to offer from the said record any other portions thereof relating to the same subject matter, subject to all objections to the competency or mate-

riality thereof. This cause was thence continued under advisement to this present term, and now, to wit, November 26, 1892, it appearing that such stipulation has been filed, and it appearing by stipulation of the defendant filed in the cause that, for the purpose of entry of decree dismissing the bill, it is to be assumed that the costs have been paid to the defendant;

"It is ordered, adjudged, and decreed that the bill of complaint herein be dismissed without prejudice.

"By the court,

"BENJ. H. BRADLEE,

"*Deputy Clerk.*"

Copy, Record, p. 166.

December 26, 1892, the defendant appealed from the decree, and filed an assignment of errors, in which it stated eleven different reasons why the decree was erroneous.

Copy, Record, pp. 168, 169, 170.

The first of these reasons purported to be a statement of the progress of the cause, and was in certain respects a statement of facts which do not appear of record. For instance, it stated that, at the time the draft report was filed, the master communicated the same to the parties, which does not appear of record. We are advised that it was not communicated to the parties, except by filing the same with the clerk. It further stated the character of the discussion before the master, after the draft report was taken from the files and before the motion to dismiss was made, which does not appear of record.

It omitted to state that the master was requested to report the pendency of the motion for leave to dismiss, and refused to do so, but filed his report in the middle of the summer

vacation without notice to the plaintiffs that he intended to do so, which does appear of record by his report.

Beyond this recital, and simply as assignments of error, these reasons amounted substantially to this:

First. That on June 1, 1891, when the plaintiffs moved for leave to dismiss their bill without prejudice upon the payment of costs, the court had no right to permit them to thus dismiss, but was bound to disregard the motion, and adjudicate the cause upon the report which was subsequently filed on August 11, 1892.

Second. That the court had no right to permit the bill to be dismissed without prejudice, but ought to have required it to be dismissed absolutely, if at all.

Third. That the court, if it allowed the bill to be dismissed at all, should have required the defendant to stipulate that all the evidence taken in the suit might be used in any future suit brought by the plaintiffs for the same cause of action.

In April, 1894, the case was heard by the Circuit Court of Appeals.

Copy, Record, p. 200.

January 2, 1895, the Circuit Court of Appeals ordered that the decree of the Circuit Court be reversed and the case remanded to that court for further proceedings, stating in the decree that the opinion of the court was to be thereafter filed.

Copy, Record, p. 200.

April 2, 1895, the complainants, appellees, filed a motion for rehearing, praying for leave to specify and certify the

grounds therefor within a reasonable time after the opinion of the court was filed.

Copy, Record, p. 201.

September 3, 1895, it was ordered by the Court of Appeals that the opinion of Judge WEBB, that day passed down, be filed as the opinion of the court.

Copy, Record, p. 202.

This opinion held that by the agreement of the parties to refer the case to a master, approved and confirmed by a decretal order of the court, and the hearing which was had before the master, the defendant acquired the right to have the report and decision of the master.

Copy, Record, pp. 207, 208.

But the opinion also held that the draft report filed on the nineteenth of February, 1891, and withdrawn on the twentieth of February, 1891, by agreement, was simply a draft report, and that the master's report could not be deemed to have been filed until after the petition for leave to dismiss.

Copy, Record, pp. 209, 210.

The opinion also held that the fact that only one of the complainants signed the petition for leave to dismiss was of no account as affecting the right of the complainants to dismiss.

Copy, Record, p. 210.

The opinion cited, as authority for the proposition that by the reference to the master the defendant acquired the right to have the decision of the master, the cases of *Kimberly* v. *Arms*, 129 U.S. 513, and *Davis* v. *Schwartz*, 105 U.S. 631,

637, and the decision denying the right of the complainants to dismiss was obviously put by the court upon the authority of these cases.

Copy, Record, p. 210.

November 12, 1895, a withdrawal of the motion for a rehearing was filed by the complainants and allowed by the court.

Copy, Record, p. 211.

No mandate has been ordered to issue from the Circuit Court of Appeals to the Circuit Court to reverse its decision in accordance with the opinion of the Circuit Court of Appeals.

Copy, Record, p. 213.

Argument and Authorities.

I.

The question raised upon this record and decided in favor of these petitioners by the decree of the Circuit Court, and decided against the petitioners by the opinion of the Circuit Court of Appeals, is an important question of general equity practice. It is a question constantly arising in the various circuits, and which it is obvious should be authoritatively settled by the decision of the Supreme Court.

The decisions in the various circuits, as will be seen by the review of them in the following argument, do not all rest upon any well-defined and uniform rule. It is, therefore, as the petitioners submit, desirable that such a rule should be established by the decision of this court. How far the petitioners can properly urge this general necessity for a definite construction by this court of its own rules,

and the establishment by this court of a definite and uniform rule in regard to the right of a complainant in equity to dismiss, in aid of this application to certify this case, counsel are unable to say. But they desire to urge this suggestion for such consideration by the court as they may be properly entitled to ask the court to give in this case.

With this suggestion counsel proceed to the discussion of this case and of the question whether the decision by the Circuit Court of Appeals was incorrect, so that, for this reason, the cause should be certified to this court for revision.

II.

The question for decision by the Court of Appeals was simply whether, *on the first day of June*, 1891, when the plaintiff filed its motion to dismiss, the cause was in a condition *which entitled the defendant to a decree upon the merits without further hearing by the chancellor*.

If the plaintiff, instead of filing a motion to dismiss on June 1, 1891, had withdrawn the appearance of its counsel, and ceased to prosecute its suit, could the chancellor, *upon the record as it then stood*, have entered any decree except that the bill be dismissed for want of prosecution?

A decree upon the merits necessarily presupposes a consideration of the merits *by the chancellor*, whose high function is incommunicable to any other officer; and until the chancellor has adjudged the merits, or has so far heard them that he can adjudge them without further hearing, he can make no decree upon the merits, and can only make a decree that the bill be dismissed without reference to the merits, *i.e.*, without prejudice to the merits.

A decree must be the decision of *the chancellor*, and a

decree dismissing the bill must either be upon the merits or without reference to the merits.

And until the cause has reached a position where the chancellor either has or can, without further hearing, make a decree *upon the merits*, the plaintiff has a right to dismiss his bill without prejudice, for that is all the chancellor could do if the plaintiff made default in his prosecution of the suit.

In the absence of any express rule of court to the contrary, this is the necessary result of the fundamental principles of equity procedure as applied to any case *in which the defendant stands in a purely defensive attitude*, as in this case.

Here the answer claimed no affirmative relief. No cross-bill was filed. On the issue joined upon the pleadings, therefore, the defendant *could never have any decree except that the plaintiff's bill be dismissed with costs.*

And such decree, if made before any adjudication upon the merits of the issue, would necessarily be "without prejudice" to such adjudication in another suit.

The words "without prejudice" in a decree dismissing a bill, only indicate that the bill is dismissed without an adjudication upon the merits of the issue joined. And though this fact should properly appear in the decree, it may always be shown *aliunde*.

Badger v. *Badger*, 1 Cliff. 237.

The question whether the decree of the Circuit Court was wrong was therefore not a question of whether it was wrong to set forth in it that it was without prejudice, *i.e.*, without any adjudication of the issue raised by the pleadings, but a question of *whether the merits of the issue had been* or could *then* have been *adjudicated* by the chancellor upon the record *then* before him.

Until the chancellor has decided, or, *upon the record then before him* can, without further hearing, decide the *merits* of the issue, the dismissal of the bill must necessarily be without a decision of the merits of the issue, and therefore without prejudice to a decision of them in another suit.

In the absence of any rule of court, or statute, making a dismissal of the bill before decision of the merits of the issue *equivalent* to a dismissal upon a decision of the merits, no decree without a decision of the merits by the chancellor can prejudice such a decision in another suit. A plaintiff may, therefore, always abandon his suit without prejudice to a new one at any time before the chancellor has adjudicated upon the merits of the issue raised by the pleadings therein, or can do so upon the record *then* before him.

A defendant has no vested right in the plaintiff's pursuit of him, and so long as the suit is *a mere pursuit* the plaintiff retains the right to stop at his pleasure. This is the logical and necessary rule in all cases where the defendant stands in a purely defensive position, asking by his answer only that the bill be dismissed, and he be permitted to go out of court with his costs.

It is an equitable rule, for, assuming, as the law conclusively does, that the costs furnish indemnity for expenses incurred in the defence, the defendant is left as well off as though he had not been sued, with the additional advantage that lapse of time has probably impaired his capacity to defend less than it has impaired the capacity of the plaintiff to prosecute a new suit.

But however this may be, it is well settled that, in a case *where the defendant stands in a purely defensive attitude, with no cross-bill, no claim for affirmative relief in his answer, and no right to claim any such relief upon anything in the bill*, — that is, with no possible claim to anything except that

the plaintiff shall *cease his pursuit of him*, — the plaintiff has a right to cease his pursuit, and to dismiss his bill, upon payment of costs, at any time before the chancellor has decided, or upon the record *then* before him can decide, the issue in the cause, in whole or in part, upon the merits.

This fundamental and necessary rule of general equity procedure is also the rule which regulates the practice of the federal courts under the express provisions of rule 90 of this court, which provides that —

> "In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

This rule, made in 1842, adopted the English equity practice *as it then existed*.

Badger v. *Badger*, 1 Cliff. 237.

In 1845, the English High Court of Chancery provided that, after an equity cause was set down for hearing before the chancellor, if the plaintiff dismissed his bill or made default without leave of court, it should be *equivalent* to a dismissal on the merits.

English Chancery Rule cxvii.; 1 Phillips, cxii.

In doing this, that court recognized and modified the then well-settled practice in the English chancery court by which a plaintiff had a right to dismiss his bill on payment of costs

at any time before a determination of the cause *by a decree upon the merits*.

The fact that this rule, though commented upon in various cases in the United States courts, and adopted in some of the state courts (as in Alabama, see *Howard* v. *Bugbee*, 25 Ala. 548), has not been adopted by this court, shows that the intention has been to preserve to the plaintiff in the federal courts the same right to dismiss which the plaintiff had under the English practice prior to the adoption of the rule. That is to say, this court having, by rule 90, adopted the English practice, *prior* to the English rule taking away the right to dismiss after the cause was set down for hearing, and not having since modified rule 90 to conform to the later English rule, *must be presumed to have intended to continue to preserve to the plaintiff in equity the right to dismiss which he had under the English practice in* 1842 *which was adopted by rule* 90.

That presumption is conclusive in the first circuit, in which this suit is pending, where the court has fully discussed the whole question in an elaborate opinion by the late Mr. Justice CLIFFORD, and though doubtless having the power, under rule 89, to make some other rule regulating the right to dismiss, has failed to do so.

Badger v. *Badger*, 1 Cliff. 237.

In that case, the court stated, that the practice adopted by rule 90 was the practice of the English chancery court as it was known and understood in 1842, and also stated what that practice then was, as follows: —

> "Prior to the new chancery orders in England (adopted in 1845), the better opinion is that plaintiff could obtain the common order dismissing his bill with costs at

any time before the cause was actually heard by the court.

"*All the cases agree that he could do so before the cause was called for final hearing*, and in many cases it is held that he could so afterwards, and that the decree or order of dismission could not be pleaded in bar to a new bill, provided it appeared that it was made without any determination of the merits."

The fact that in 1845 the English court adopted a new rule limiting the right to dismiss, so that it could not be exercised after the cause was set down for hearing before the chancellor, also shows clearly that, before the rule, the right to dismiss was not lost even by setting the cause down for such hearing.

English Cases.

The English cases are clear to the effect that, before the new rules in 1845, the right to dismiss was not lost until the court had made a decree which fixed the rights of the parties either as to the whole or a part of the issues in the cause.

Stated in order of time they are as follows: —

Gilbert v. *Faules* (sometimes cited as *Gilbert* v. *Hales*, and sometimes as *Gilbert* v. *Hawles*), 1 Ch. Cas. 40; Freeman, 158 (1661).

This was a bill to be relieved against an action for rent, and at the hearing of the cause *it was decreed to an account*. The account was stated by the master, and then the plaintiff moved to dismiss his bill with costs, which was opposed and denied for the reason that there had been a decree upon the merits.

Countess of Plymouth v. *Bladen*, 2 Vern. 32 (1688).

This was a bill for an account against a steward of an estate. The defendant objected that the plaintiff had brought a similar suit before, which she had dismissed, and brought an action at law, and then, failing in that action, had filed the second bill; but the court declined to treat the first bill as a bar to the second, because it had not been decided upon the merits, and said, —

> "A decision upon an election is not peremptory, no more than a nonsuit at law."

Mill v. *Green*, cited in notes to third edition of 2 Madd. Ch. Pr. 509, as found in the Hargrave manuscripts, British Museum, No. 54 (1745).

I do not find that this case is elsewhere referred to, and all that is quoted from it in Maddock is a statement by CLARK, B., that —

> "A plaintiff ought not to move to dismiss his own bill *after the case is set down*, for the defendant has a right to a hearing, and to have the bill determined on its merits so as to be a bar."

It is true that the note contains the following statement: —

> "There seems much force in this reasoning, and contrary practice might lead to great oppression."

But in this edition of Maddock, which was published in 1837, the text states the rule of practice, without qualification, in the following language: —

> "A plaintiff may, in any stage of the cause, apply to

dismiss his bill upon payment of costs *even after issue has been directed*, but not after a decree,"—

citing *Locke* v. *Nash*, decided in 1816, where the case was at issue and set down for hearing before the chancellor when the plaintiff moved to dismiss with costs, which was opposed; but upon inquiry by the master of the rolls, Sir WILLIAM GRANT, whether there was any authority against the right to dismiss at that stage, counsel stated there was not, and thereupon the master of the rolls allowed the motion to dismiss.

Carrington v. *Holly*, Dickens, 280 (1755).

The report of this case is as follows: —

"The plaintiff filed his bill to establish his right to estates. *Upon hearing the cause, an issue was directed.* The plaintiff, being advised he had not made a case by the bill and the matter put in issue to support his claim, applied by *motion*, and obtained an order of course to dismiss his bill upon payment of costs.

"The defendant applied the above day to discharge the said order for irregularity, upon the ground that, the cause having been regularly brought on to a hearing, the bill could not be dismissed but on a solemn judgment.

"Lord HARDWICKE, C.: 'There hath not been any determination; the directing of an issue is merely to satisfy the conscience of the court prefatory to their giving judgment. That issue hath not been tried, *and till there hath been a determination I hold a plaintiff may, in any stage of the cause, apply to dismiss his bill upon payment of costs, and therefore take nothing by the motion.*'

"But his lordship said, had there been a decree it

would have been otherwise; for all parties were interested in a decree, and any party might take such steps as he might be advised to have the effect of it.

"So, likewise, said his lordship, it would have been had the issue been tried, and a verdict in favor of the defendant; the defendant might have set the cause down on the equity reserved in order to have the bill dismissed upon the solemn judgment of the court, so as to make the order of dismission pleadable. The language of the order directing the issue shows it; for the court, after it directs the issue, reserves the consideration of costs, and of all further directions, until after the trial of the issue, when any of the parties are to be at liberty to apply to this court as they shall be advised."

This is, doubtless, the leading case, and the later cases nearly all cite it as authority for the rule that the right to dismiss is not lost until there has been some decision upon the merits, in whole or in part.

It may be claimed that the suggestion of Lord HARDWICKE in this case, that, if the issue had been tried, and a verdict had been rendered in favor of the defendant, the plaintiff could not have dismissed as a matter of right, was, in effect, a decision that after a master had made his report, the plaintiff could not dismiss as of right, because the findings of a master are equivalent to the verdict of a jury upon an issue framed in chancery.

But a master's report, to have any weight, must be confirmed. A master's report, even when filed (and it is obvious that until filed it *is not even a report*), is of no effect until confirmed, either as of course for want of exceptions, or upon the hearing of the exceptions by the court.

Equity Rules, 83, 84.

It is obviously only a verdict *accepted* and *recorded*, or a master's report *confirmed*, that can possibly be said to be even a basis for a decree.

Langdale v. *Langdale*, 13 Ves. 167 (1806).

Here a plaintiff was allowed to dismiss his bill against the objection of a co-plaintiff, and the note of Vesey to this case states it as settled that "it is a motion of course *at any time before a decree* for a sole plaintiff to dismiss his own bill with costs."

Pickett v. *Loggon*, 14 Ves. 215 (1807).

This case, which was before the court on numerous questions, is sometimes cited as tending to show that Lord ELDON did not recognize the rule that the plaintiff in equity had a right to dismiss at any time before decree. An examination of the case will show that the remarks of the chancellor do not bear that construction, but the contrary.

The bill in that case was filed twelve years after the transactions involved, and eight years after another bill filed for the same cause had proceeded so far as to require answers, which were put in, and a replication filed, and witnesses examined, and *publication passed*, so that the cause might have been brought to a hearing before the chancellor upon the merits; but the plaintiff made default upon the hearing of the merits before the chancellor, and the bill was, upon that ground, dismissed with costs.

Upon the filing of the second bill, proceedings were stayed until the costs of the first suit, which were very large, were paid, which delayed the proceedings about three years.

Upon the hearing of the second suit before Lord ELDON, the question was raised whether the decree dismissing the bill in the former suit was a bar. The chancellor said that

if it was, the defendant should have set it up either by a plea in bar or by an answer, but he then said, —

> "Whether in either shape, by a plea in bar or by an answer claiming the same benefit as if it had been pleaded, that judgment would have been an absolute answer to this proceeding. I profess to entertain some doubt, but there is more authority than I was aware of for holding that it would not have been an absolute bar, *the cause not having been heard upon the merits*, in this sense, that the circumstances were not discussed. At the same time, if a party thinks proper to bring his cause to a hearing upon examination of witnesses, *publication passed*, and the cause capable of being opened, and then makes default, it is very difficult, and it would be rather mischievous, to treat such conduct merely as a nonsuit at law."

These remarks obviously refer to a case where the cause was by the publication of the testimony, and setting the cause down for hearing before the chancellor, ripe for a hearing; and yet Lord ELDON went on to say that he should be "extremely unwilling to have it thought that his decree in the second suit then before him, would determine how far the second bill could or could not be sustained if the former decree had been pleaded," and that he "desired that his judgment upon that question should not be considered as involved in anything he said, because he was of the opinion that the defendants, by failing to set up the proceedings in the first suit, had waived any benefit that might have arisen to them therefrom."

And he also referred to *Cann* v. *Cann*, 1 P. Wms. 723, where the effect of a former suit was before Lord SOMERS

and Lord MACCLESFIELD. There a bill was brought upon the question whether a claim could be made under a will; issues were joined, each party examined witnesses, the examinations were published, and the court made a decree. Then a second suit was brought, and it was claimed, not only that the decree in the first suit was a bar, but that subsequent acts had taken place which were of themselves a bar to the second suit. Lord SOMERS held the plea of the first suit not to be a bar, and required the defendants to answer the new matter. Afterwards the case came before Lord MACCLESFIELD upon a bill of revivor, and he dismissed the bill, observing that, in the first suit, not only had witnesses been examined and the examinations published, but the court *had made a decree* which, it must be conceived, was made upon the evidence as read. But he expressly declined even in that case to put his decision dismissing the bill solely upon the ground that the former decree was a bar, "though that had proceeded upon an examination of the merits."

None of the cases with regard to the right to dismiss before decree appear to have been cited in the discussion by counsel or chancellor in *Pickett* v. *Loggon*, but the case, so far as it discussed that question, obviously recognized the rule that, until there was a decree of some kind upon the merits, the plaintiff did not lose the right to abandon his suit.

Handford v. *Storie*, 2 Sim. & Stu. 196 (1825).

Here a holder of debenture bonds secured by trust deeds brought a bill for account against the trustees and the obligors, on behalf of himself and all other holders of the debentures who might come in. One of the obligors agreed to buy Storie's (the then plaintiff) bonds; and the purchase

was made and the bill dismissed, before any decree was made. A bill was then filed by another holder of other bonds, in behalf of himself and others, against Storie, the trustees, and the obligors.

Sir John LEACH, V.C., said, —

> "It is said that Mr. Storie, having instituted this suit for the benefit of himself and all the other debenture holders, was not at liberty, upon general principles, to dismiss his bill from motives of advantage to himself. I know of no such general principle. A plaintiff who sues on behalf of himself and all other persons of the same class, as he acts upon his own mere motion and at his own expense, *retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure.*"

White v. *Lord Westmeath*, Beat. 174 (1828).

Here, upon a bill for foreclosure of a mortgage, and against a holder of an annuity charged on the land, answer was filed, and a receiver and a master were appointed by consent, and the master reported in what manner the rents should be applied. The plaintiff then moved to dismiss upon payment of costs. There was another suit against Lord WESTMEATH on behalf of his wife, in regard to the same matters.

HART, L.C., said —

> "In that class of cases in which, to avoid a multiplicity of suits, one person is allowed to sue on behalf of himself and all others in the same interest, the plaintiff cannot dismiss his bill after a decree, because such a decree not only provides for the rights of himself, but of all others who choose to come in and take the benefit

> of it. But even in those cases, I apprehend that the rule of the court only applies to suits *in which a decree has been pronounced*."

But there is no analogy between the suit at bar and that class of cases. The plaintiff here seeks solely for the recovery of his own debt. "The plaintiff can dismiss."

Booth v. *Leycester*, and *Palmer* v. *Leycester*, 1 Keen, 247 (1836).

This was a case of cross-bills. The original bill sought payments of certain annuities granted by the plaintiff in the cross-bill, who, by his bill, disputed the validity of the annuities, and prayed affirmative relief. After issue joined on each bill, an interlocutory order was made that the money be paid into court, which was done. Testimony was then taken in both causes under an agreement that it should be used in each, and *after the publication of the testimony* both causes were set down for hearing together. Palmer then sought to dismiss his bill, to which the plaintiff in the original bill objected, because a cross-bill had been brought, money had been paid into court, and an agreement had been made as to the use of testimony.

Lord LANGDALE, master of the rolls, said he did not think the plaintiff in a cross-bill had a right to dismiss as of course, but only upon an application specially made to the court, though he "had a strong impression that a plaintiff might dismiss his own cause, upon the payment of costs, at any time."

The further remark of the master of the rolls, that it was

> "quite reasonable that the plaintiff ought not to have the power of dismissing his bill, when by so doing he might prejudice the defendant," —

was obviously made with reference to the case then before him, and was not intended to lay down a general rule that the plaintiff can dismiss only when the chancellor thinks it equitable, or that it would not prejudice the defendant.

The statement of this case in *Stevens* v. *Railroads*, 4 Fed. Rep. 97, subsequently cited in this argument, is not entirely accurate; and the case is certainly not an authority for the broad proposition that the right to dismiss depends solely upon whether, in the opinion of the chancellor, it is equitable that the plaintiff should do so.

Bluck v. *Colnaghi*, 9 Sim. 411 (1838).

This was a suit to wind up a partnership; and it was held that, after a decretal order to take the accounts had been made, the plaintiff could not dismiss, because an order *in the nature of a decree had been made*, *i.e.*, the obligation to account had been decided.

Curtis v. *Lloyd*, 4 Mylne & Craig, 194 (1838).

Here issue had been joined, testimony taken, *publication passed*, and the cause was called for hearing before the chancellor, when the plaintiff asked to have it stand over until the next day. On the next day, when the case was again called, it was found that the plaintiff had dismissed his bill as of course upon payment of costs. Objection was made to the order of dismissal, as improperly entered, and the question was fully argued as to the right to dismiss under such circumstances. The chancellor, Lord COTTENHAM, allowed the motion to dismiss, saying, —

> "I was not aware that the doctrine had been carried to the extent to which Lord HARDWICKE seems to carry it in *Carrington* v. *Holly*, *but I cannot see why a plain-*

tiff should be in a worse situation because he informs the court that he does not intend to proceed with the hearing of his cause than if he made default."

Cooper v. *Lewis*, 2 Phillips, 178 (1847).

This case was subsequent to the new rules of 1845, but it was cited below by the defendants, and I therefore state it. Here the defendant had paid costs ordered to be paid upon an interlocutory order overruling his demurrer to the bill, and had therefore a right to appeal, and, if he prevailed, to recover them of the plaintiff. The plaintiff then filed a petition to dismiss his bill, in which he did not set forth the fact of the order overruling the demurrer, payment of costs, etc. Upon this petition he obtained an *ex parte* order dismissing his bill. Upon subsequent motion to vacate the order, Lord COTTENHAM said that the failure to set forth the interlocutory order overruling the demurrer, and the payment of costs, was a suppression of facts which should have been set forth in the petition, and *for that reason* vacated the *ex parte* order dismissing the bill.

He also said that by the dismissal the defendant lost the right, which he had under the order overruling the demurrer, to appeal from that order and recover the costs which he had paid: and therefore the plaintiff, by dismissing his bill and paying a very small amount of costs, would deprive the defendant of a right which he had acquired by the order overruling the demurrer and the payment of costs thereunder, to recover upon appeal costs which were very much larger in amount than those which the plaintiff was bound to pay upon the dismissal of the bill. He also referred to *Carrington* v. *Holly*, as being put on the ground that the right to dismiss existed in that case because "no adjudication had been made."

The approved treatises upon English chancery practice also all give the rule as stated by Mr. Justice CLIFFORD in *Badger* v. *Badger*, that, at any time before the case is called for final hearing by the chancellor, or a decree or order has been made which touches the merits of the issue, the plaintiff may dismiss his bill upon the payment of costs.

Harrison states that the only question which can arise upon a motion to dismiss before decree is as to the costs which the defendant should recover.

1 Harrison's Practice, 608.

Daniell states the rule thus:

> "It is a matter of course to permit the plaintiff to dismiss the bill at any time before decree upon payment of costs; but the order for such leave is conditional, and the suit not absolutely discontinued so as to authorize the filing a new bill till the costs of the first suit are paid."

Daniell's Ch. Pr. (4th ed.), 793.

In Montagu's Equity Digest it is stated as follows: —

> "An order for dismission is no bar, unless it *determines that the plaintiff is not entitled to the relief sought.*"

Montagu's Eq. Dig. p. 181, citing Beames' Elem. Pl. 211.

See, also, —

Cooper's Eq. Pl. 270.

Mitford & Tyler's Pl. 330, to the same effect.

As I have before suggested, the fact that this court, though recognizing that the new rule of the English chancery court, in 1845, providing that the plaintiff cannot dismiss

after the cause is set down for hearing before the chancellor without making the decree of dismissal equivalent to a decree dismissing the case upon the merits, was *a limitation* of the previous right to dismiss at any time before a decree or decretal order, have not adopted a similar rule of limitation, shows conclusively that the intention has been to preserve to plaintiffs in this court the same right to dismiss at any time before an adjudication of the merits which existed in the English chancery court before the rule of 1845.

The claimed inequity of the rule under which the plaintiff has the right to protect his interests by abandoning his suit and paying the defendant his costs at any time before the court has adjudicated upon the merits of the issue, to some extent has not been so apparent as to induce this court to limit that rule.

And it may be still further observed that even if the English rule had been adopted by this court it would not have deprived the plaintiffs of the right to dismiss in this case, *for there is no claim that, at the time of this motion, this cause had been or could, on the record as it then stood, or even as it now stands, be set down for hearing before the chancellor.*

Before a cause can be thus set down for hearing before the chancellor, except when it is set for hearing on bill and answer, the testimony must be closed and an order for publication passed, or, in case of reference to a master, the master's final report must not only be filed, but also confirmed either under the rule, by the lapse of thirty days when there are no exceptions, or, in the case of exceptions, by a hearing and decision of the exceptions by the chancellor. So that even within the limitation of the English rule of 1845 the plaintiffs here had a right to dismiss when their motion was made.

But no rule has been adopted in the federal courts limiting the plaintiff's right to dismiss to anything less than existed under the English chancery practice in 1842, and the decisions of the circuit courts and of the Supreme Court all sustain that right as stated by Mr. Justice CLIFFORD in the first circuit.

FEDERAL DECISIONS.

Badger v. *Badger*, 1 Cliff. 237 (1859).

Here the questions of the right of a plaintiff to dismiss in equity, and of the effect of such dismissal, are very fully discussed, and the effect of rule 90 more clearly set forth than in any other case. It appeared that the plaintiff had brought a suit in equity, and issue was joined, and testimony taken but not published; and before the cause was set down for hearing, the complainant moved that his bill be dismissed "without prejudice" which was, upon hearing, denied. The complainant then moved that his bill "be dismissed," and no objection being made to such form of dismissal, the court ordered "that the bill of complaint in this cause be, and the same is hereby, dismissed with costs for the respondents."

The plaintiff then brought another suit in equity for the same cause, to which the defendant pleaded the decree in the former suit in bar, claiming that, as the decree was not "without prejudice," or "reserving right to bring another bill," or with any other equivalent qualification, it was conclusive as to all matters involved in that suit.

The court held, however, that as the former suit *was not heard by the court upon the merits*, the decree dismissing the bill was not a bar to the second suit, and stated that the right to dismiss in equity was the same as the right to become nonsuit at law, and existed until there had been *a determination of the suit, or some part thereof, upon the merits*. The court

also held that the practice of the United States courts is unaffected by the new orders of the English chancery court, because rule 90 regulating the practice in equity in the circuit and district courts of the United States, which provides that, in all cases where the rules prescribed do not apply, the practice shall be regulated by the practice of the High Court of Chancery in England, etc., was ordained in 1842, prior to the new orders of the English chancery court, and adopts the English practice, *as it was known and understood in* 1842; at which time it was clear, upon the English authorities, that the plaintiff in equity had a right to dismiss at any time before a determination by the court of the cause upon the merits.

The English rule is stated in that case in the following explicit language, which I have before quoted: —

> "Prior to the New Chancery Orders in England (adopted in 1845) the better opinion is that plaintiff could obtain the common order dismissing his bill with costs at any time before the cause was actually heard by the court.
>
> "*All the cases agree that he could do so before the cause was called for final hearing*, and in many cases it is held that he could do so afterwards, and that the decree or order of dismission could not be pleaded in bar to a new bill, provided it appeared that it was made *without any determination of the merits.*"

The other federal decisions in the order of time are as follows: —

Conn v. *Penn*, 5 Wheat. 424 (1820).

Here an interlocutory decree was rendered granting relief to certain classes of the plaintiffs, and directing them to ap-

pear before commissioners appointed for that purpose, and show that they came within the description of persons who were entitled to relief. It was conceded that this decree decided to a great extent the merits of the cause, and it was rendered at a time when one of the defendants was not before the court, through the fault of the plaintiffs. The plaintiffs refused to appear before the commissioners, and made default. It was held in the opinion by Chief Justice MARSHALL that the Circuit Court, under such circumstances, properly dismissed the bill; but he said, —

> "We think it would be harsh to make the decree of dismission a bar to future action. It is not certain that this decree is on such a hearing as to be a bar to a future action."

Hopkins v. *Lee*, 6 Wheat. 109 (1821).

Here the court held that the record of a previous suit for the same cause, in which the facts had been found by a master and his report had been confirmed by the court, was properly admitted in evidence, upon the ground that the report had not been excepted to by either party, and *had been confirmed and a decree made upon it by the court*, which made it evidence of the facts found thereby as much as the verdict of a jury. But the court declined to say that the report was conclusive evidence, and only held that it was admissible.

Stevens v. *Railroads*, 4 Fed. Rep. 97 (1880).

Here it appeared that twenty suits in equity were brought by the holders of bonds of the state of Tennessee to enforce, against certain railroads named as defendants, a lien on their roads. Persons holding bonds subsequently issued under an adjustment with the state, and called substitution

bondholders, were also made defendants, and they answered that their bonds were issued in the process of a settlement and adjustment with the state, and for the purpose of carrying out that adjustment and settlement; that the plaintiffs knew of, and acquiesced in, this settlement and adjustment, and were estopped to deny its validity, and *they asked for a decree establishing the validity of that settlement and adjustment*, and preventing the plaintiffs from transferring their bonds to other parties who would not be bound by the estoppel; *i.e.*, *they asked for affirmative relief.*

The cases were all prepared for trial by the taking of testimony, and, being set for hearing, *were all tried by the court except three.* Before the decision of the cases which had been tried, the three other cases were set for trial before the court on a certain day, by written stipulation of all parties. On that day the plaintiffs moved to dismiss their bill upon payment of costs, which was opposed on the ground that the defendants had by their answers acquired a right to have their lien established as against the plaintiff, and to have the plaintiffs enjoined from transferring their bonds to persons who would not be bound by the estoppel; *i.e.*, *had asked for affirmative relief.*

It was also objected to the motion that the defendants, having answered under oath, could not be deprived of the benefit of the answer as evidence by the dismissal of the bill, and the bringing of a new suit waiving answer under oath, and that there appeared by the pleadings to be rights to be adjudicated between the various defendants themselves.

The court held that these last objections did not qualify the right to dismiss, but denied the motion upon the ground that the dismissal of the bill would deprive the defendants of substantive rights which, by their answers, they were entitled to have established affirmatively against the plaintiff.

The court said that, —

> "To deprive the plaintiff of the right to dismiss, *there must have been such order or proceeding in the cause as conferred rights upon the defendant* which would be defeated or impaired by allowing the dismissal, and *not the mere ordinary inconvenience of double litigation*, which in the eye of the law would be compensated by costs."

In considering this case it is also proper to observe that the defendants were probably entitled to an injunction to restrain the plaintiffs from transferring the bonds, on the ground that when a plaintiff in equity sets up a false claim to specific property the defendants may have an injunction to restrain him from setting it up again, even without a prayer for it in the answer. 2 Dan. Ch. Prac. (5th ed.), 614, note.

Chicago & Alton Railroad v. *Union Rolling Mill Co.*, 109 U.S. 702 (1884).

This was a bill to foreclose a trust deed. Answers were filed; one claiming a first lien on the property of the Illinois River Railroad, by virtue of a contract of sale of iron rails to the railroad company. The Rolling Mill also filed a cross-bill setting up the same matter as in its answer, *and praying affirmative relief*. A master was appointed, and filed his report, which found that the Rolling Mill had a lien of $186,783.49 on the railroad. This report was referred back to the master to take further evidence, and a year later the master filed his second report, to which exceptions were taken in that it found that the Rolling Mill was entitled to a first lien. *An interlocutory decree was entered upon the*

report, after argument. And then the plaintiff in the original bill moved for leave to dismiss, and leave was refused.

The court, in its opinion, said, —

> "It may also be conceded that, *as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill.* But this latter rule is subject to a distinct and well-settled exception, namely, that *after a decree, whether final or interlocutory, has been made, by which the rights of the party defendant have been adjudicated, or such proceedings taken as entitle the defendant to a decree,* the complainant will not be allowed to dismiss his bill without the consent of the defendant."

American Zylonite v. *Celluloid Mfg. Co.*, 32 Fed. Rep. 809 (1887).

This was a bill to restrain alleged infringements of a patent. The defendant filed its answer, denying infringement, and alleging, among other defences, prior invention. Proofs were printed, and the case set down for hearing. On that day the plaintiff, having previously made an *ex parte* entry in the rule book, moved for leave to dismiss upon payment of costs. The defendant opposed this motion, and argued that the dismissal should be upon the merits, alleging that it could not again procure the evidence, which it had taken and printed, of prior invention.

But the court allowed the motion to dismiss, upon condition that the plaintiff file a stipulation that the defendant could use its evidence in any other suit for the same cause of action, saying, —

> "The *ex parte* entry in the rule book was a nullity. A complainant in an equity action cannot, in this

manner, discontinue the suit. An order of the court is necessary. *The right, however, of a complainant to dismiss a bill before hearing, where the defendant has acquired no substantive rights, is wellnigh absolute.* It must be an extraordinary case where the court refuses to exercise this discretion."

Electrical Accumulator Company v. *Brush Electric Company*, 44 Fed. Rep. 602 (December, 1890).

Here the plaintiff brought a suit to set aside a patent held by the defendant, as an interference with the plaintiff's prior patent. The defendant answered, affirming the validity of its own patent, denying that of the plaintiff's, and praying for affirmative relief against the plaintiff to restrain it from transferring its right under its alleged patent, or otherwise availing itself of any rights thereunder. Issue was joined, and testimony taken, by the plaintiff in support of its bill, and by the defendant in support of its answer. The plaintiff then filed a supplemental bill, to which the defendant demurred. The plaintiff then moved for leave to dismiss its bill.

The motion was heard before BROWN, J., who stated the question to be —

"as to the right of a plaintiff to dismiss his bill after proofs have been taken, and before a hearing, and after *an answer praying for affirmative relief has been filed.*"

After discussing somewhat the question whether the defendant could have the same benefit of a claim for affirmative relief in an answer as though it had been set up in a cross-bill, the court said, —

> "We think the defendant should be considered as having the same rights as though it had filed a cross-bill;"

and then proceeded to state the rule as to the right to dismiss, as follows: —

> "While there is no doubt of the general proposition that a plaintiff in equity may dismiss his bill at any time before a hearing, it is equally well settled that he cannot do so without an order of court, — a practice which implies a certain discretion on the part of the court to refuse such an order, if, under the particular facts of the case, a dismissal would be prejudicial to the rights of the defendant."

The court obviously meant by "prejudicial to the rights of the defendant" that the dismissal must be prejudicial to rights *acquired in the suit*, so that the dismissal of the bill deprives the defendant of something which he *has* in the progress of the cause obtained *a right to ask the court to order upon the record as it stands* when the motion to dismiss is made by the plaintiff. This is made clear by the illustrations put in the other parts of the opinion.

The court say, —

"Leave to discontinue has been denied where the defendant has set up a counter claim which would be barred by the statute of limitations," citing *Van Allen* v. *Schermerhorn*, 14 How. Pr. 287. That is, where the defendant has *a right* to have the counter claim adjudicated, and where, if it is not adjudicated as set up, it would be barred by the statute of limitations.

"Where the defendant pleaded an estoppel, which, if established, would amount to a defeasance of a lien claimed

by the defendant upon his property, and which it was the object of the bill to enforce," citing *Stevens* v. *Railroads*, 4 Fed. Rep. 97. That is, where the defendant, under its answer, had *a right* to affirmative relief.

"Where the defendant sought to dismiss his cross-bill after the original and cross-bill had been set down to be heard together," citing *Booth* v. *Leycester*, 1 Keen, 247. That is, where the defendant had *a right* to affirmative relief upon his cross-bill, so that the plaintiff had no more right to put him out of court by dismissing the original bill than the defendant had to put the plaintiff out of court by dismissing the cross-bill; both parties in such a case being actors, and each having the right to hold the other in court until the claim made against him is decided.

"Where a general demurrer had been overruled upon argument, and defendant had appealed," citing *Cooper* v. *Lewis*, 2 Phil. Ch. 178. That is, upon the facts of that case as hereinabove shown, where the defendant had obtained *a right* to recover from the plaintiff the costs paid to him upon overruling the demurrer.

"After an order to account, and a report has been made," citing *Bethia* v. *McKay*, Cheves (S.C.) Eq. 93. That is, where a decree to account had been made, and a report of the account filed; in which case, as the chancellor said, "the decree to account fixes the *rights* of the parties."

"Where a cross-bill was filed to a bill of foreclosure," citing *Bank* v. *Rose*, 1 Rich. Eq. 292. That is, where the defendant had by its crossbill obtained *a right* to a decree in its favor. It is to be observed, also, in regard to this case, that there had been a final hearing upon the merits before the chancellor, who had actually written the

decree for the defendant before the motion to dismiss was made.

The opinion also cites *Chicago & Alton R.R. Co.* v. *Union Rolling Mill Co.*, 109 U.S. 702, 713, where the rule as to dismissal and the exception thereto is stated as follows: —

> "As a general rule a complainant in an original bill has the right at any time upon payment of costs to dismiss his bill, but this later rule is subject to a distinct and well-settled exception, namely, that after a decree, whether final or interlocutory, has been made, *by which the rights of a party have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree*, the complainant will not be allowed to dismiss his bill without the consent of the defendant."

It is plain that the language, "prejudicial to the rights of the defendant," and the subsequent language, "manifestly prejudicial to the defendant" mean prejudicial *to some right which the defendant has acquired in the cause*. This is shown further by the statement of the case then under consideration, which is stated thus:

> "The defendant *is entitled under his answer to an affirmative decree* declaring the invalidity of the plaintiff's patent in establishing the priority of its own. Relying upon this, it has neglected to institute a cross cause, and to allow this bill to be dismissed would be virtually to shorten the life of its patent for the time this litigation has been pending. Indeed, as the very object of the statute is to save the necessity of two suits, it will be manifestly unjust to permit either party to put an end to the litigation by dismissing *its own bill*."

I have been thus full in stating this case because it was claimed in the court below that it was an authority to the proposition that the plaintiff could not dismiss in any case where it appeared to the chancellor to be *unjust;* or in other words, that the right to dismiss does not depend upon whether the defendant has acquired rights in the case which he will lose by the dismissal, but *upon the discretion of the chancellor*. As I read the opinion, it is clear that it was not intended to establish any such rule, but simply to restate the familiar rule that the plaintiff could not, by dismissal of the bill, deprive the defendant of the benefit of his cross-bill, or of a prayer for affirmative relief in the answer, which is equivalent to a cross-bill.

Hat Sweat Mfg. Co. v. *Waring et al.*, 46 Fed. Rep. 87 (1891).

Here a complainant was not allowed to dismiss a bill to restrain infringement of a patent, because the defendant had claimed in his answer "that the license upon which the suit was brought was fraudulent and void, and asked that it be given up to be cancelled," *i.e., had claimed affirmative relief*, citing 44 Fed. Rep. 602.

Pullman Palace Car Co. v. *Central Transportation Co.*, 49 Fed. Rep. 261 (December, 1891).

Here the bill was to "enjoin the defendant against proceeding at law to collect rent under a lease which the bill alleged was invalid, and to assist the plaintiff to deliver the leased property, to decide what compensation should be paid the defendant for its previous use, and generally to settle the controversy which had arisen out of the transactions between the parties, and to finally terminate their relations." The court granted an injunction against proceeding at law,

held that the validity of the lease could be settled in an action for rent then pending, and declined to enjoin such action. Subsequently, on a trial at law, the lease was found to be invalid. The plaintiff then sought to dismiss its bill, and the defendant filed a cross-bill to recover possession of the leased property, or compensation therefor, and compensation for its use by the plaintiff. The motion to dismiss was denied, upon the ground that the defendant had a right by its cross-bill —

> "to assume an aggressive attitude in the proceeding, and use it as a means of settling and closing up the entire controversy."

Herschberger v. *Blewett*, 55 Fed. Rep. 170 (December, 1892).

This appears to have been a bill to settle title to real estate. A demurrer to the bill was sustained. An amended bill was filed, and a demurrer thereto overruled. The defendant answered, and exceptions to their answers were overruled. Issue was then joined. The time for taking evidence under the rule expired, and no motion was made to enlarge it. The plaintiff then moved to dismiss without prejudice. The motion was overruled upon the ground, as stated by the court, that although —

> "no cross-bill has been filed, the case is not so materially different on that account as to require the application of a different legal principle. . . . No evidence has been taken, but *the evidence is shut out by the rules, and the controversy between the parties has been practically ended by the interlocutory decrees* upon the demurrers and exceptions to the answers.

City of Detroit v. *Detroit City Railway Co.*, 55 Fed. Rep. 569 (March, 1893).

This was a bill originally brought in the state court of Michigan, where it was set for hearing on bill and answer, and then removed to the federal court on the ground of local prejudice. It was regularly noticed in the federal court for hearing, and when called for hearing was specially set over to be heard at a later day. On that day the plaintiff moved to dismiss the bill without prejudice. The answer, filed in the state court, claimed affirmative relief under a rule of that court which provided that such relief might be claimed in an answer with like effect as by a cross-bill.

For this reason the motion to dismiss was denied, the court saying, —

> "When this cause was removed from the state court, the complainant was in court both upon the bill and the cross-bill. The issues to the bill and answer were made up, and the complainant was in default as to the cross-bill. . . . We think the railway company, defendant, *is here asking affirmative relief on its cross-bill*, and if its contentions are well founded, it entitles itself to relief by injunction. If we dismiss the bill, it would seem that, under the decision in *Chicago & Alton Railroad Company* v. *Union Rolling Mill Company*, 109 U.S. 702, the cross-bill would fall too. . . . Thereby it would be required to bring another bill to assert the same right to affirmative relief it now claims. . . ."

In that case the opinion of the Circuit Court in this case is cited, and the portion of the opinion which states the rule as to exceptions to the general rule that the plaintiff has a right to dismiss before decree, is quoted and approved, as follows : —

"These exceptions are based upon the principle that a complainant should not be permitted to dismiss his bill when such action would be prejudicial to the defendant; but this does not mean that it is within the discretion of the court to deny the complainant this privilege under any circumstances where it might think such a dismissal would work a hardship to the defendant; as, for example, where it might burden him with the trouble and annoyance of defending against a second suit; but it means that if, *during the progress of the cause*, the defendant has acquired some right, or if he seeks, or has become entitled to, affirmative relief, so that it would work an actual prejudice against him to have the case dismissed, then the complainant will not be permitted to dismiss his bill."

State Decisions.

The decisions in the state courts in which the English chancery rule, limiting the right to dismiss to the time when the cause has been set for hearing, have not been adopted, hold the same rule, the only exceptions being cases where the defendant had filed a cross-bill, or by his answer set up a claim for affirmative relief.

Smith v. *Smith*, 2 Blackf. 232 (1829).

Here the answer claimed affirmative relief, and the court ordered the plaintiff to pay money into court, which he failed to do, and leave to dismiss was refused, obviously because the plaintiff was in contempt and the defendant had claimed affirmative relief.

Cummins v. *Bennett*, 8 Paige, 79 (1840).

Here, on a bill for an injunction, a temporary injunction was granted, which, upon the filing of the answer, was dissolved. The plaintiff then entered an order to dismiss his bill without paying costs, and filed another bill, and got another injunction.

WALWORTH, Ch., vacated the injunction, but said, —

> "*It is a matter of course to permit a complainant to dismiss his bill at any time before an interlocutory or final decree has been made in the cause, upon payment of costs.* . . . But the complainant cannot discontinue his suit, in any case, except upon a special order of the court, after due notice of the application to the adverse party, . . . unless it be upon the terms of paying the costs. . . . An *ex parte* order to dismiss upon payment of costs is therefore always conditional. And the suit is not absolutely out of court, so as to authorize the complainant to file a new bill, *until he has paid the costs.*

Bethia v. *McKay*, Cheves (S.C.) Eq. 93 (1840).

This was a bill for partition and account. *An account was ordered, and the master's report filed.* When defendant moved to confirm the report, the plaintiff moved to dismiss, but the chancellor denied the motion and confirmed the report, saying, —

> "A decree to account is one *fixing the rights* of the parties."

Seymour v. *Jerome*, Walk. (Mich.) 356 (1844).

This was a bill to settle partnership accounts. And an application to dismiss, after an interlocutory order for an ac-

count to be taken by a master, was refused, MANNING, Ch., saying, —

> "The interlocutory order 'admits the partnership *and the right of complainant to an account. . . . To that extent, it is an adjudication of the rights of the parties. A complainant may at any time, before there has been an interlocutory or final decree in a cause, dismiss his bill as of course on payment of costs.* . . . But the present application does not come within it.'"

Vaneman v. *Fairbrother*, 7 Blackf. 541 (1845).

Here, on a bill for an injunction, a temporary injunction was granted, and an answer was then filed. At the next term the injunction was dissolved. And after several continuances, the plaintiff dismissed the bill in the clerk's office, and then moved the court for leave to dismiss without prejudice, which the court refused, but did allow the bill to be dismissed, saying, —

> "The dismissal of the bill in the clerk's office, therefore, was unauthorized and amounts to nothing. . . . But independently of any statutory provision, a plaintiff in equity *has absolute control over the suit until the decree, and may, previously to that event, dismiss his bill in court at his pleasure.* But such a dismission does not operate like a decree of dismission on final hearing, and cannot be pleaded in the same manner; it operates only in the nature of a nonsuit at law, and does not bar other proceedings for the same cause either at law or in chancery. . . . The words 'with prejudice,' or those 'without prejudice,' are unmeaning in an order of dismissal on a motion of the complainant without a final hearing.

See, also, —

COLE, J., to same effect in *Babb* v. *Mackey*, 10 Wis. 371.

Watt v. *Crawford*, 11 Paige, 470 (1845).

Here there had been a decree in favor of the defendant Crawford, and a sale of mortgaged premises thereunder, and it was held that the complainant could not dismiss the bill without the consent of the defendant, but the court said that

> "Before any decree or decretal order has been made in a suit in chancery, *by which a defendant therein has acquired rights*, the defendant is at liberty to dismiss his bill upon payment of costs."

Bullock v. *Zilley*, 1 Halst. (Ch.) 77 (1845).

This was a bill to get a share of the surplus in the hands of an executor, making the other distributees defendants, and the answer submitted the rights of the defendants to the judgment of the court. After this, the person at whose death the principal sum was to be distributed to the plaintiff and others died, and then the plaintiff settled with the executor and moved to dismiss the bill, which was allowed, HALSTED, Ch., saying, —

> "One person is allowed to file a bill on behalf of himself and all others in the same interest who may choose to come in. . . . In such case the decree provides for the rights not only of the complainant, but of all others who come in to take the benefit of it; and therefore the complainant cannot, *after the decree*, dismiss his bill. I do not think the present case is within this principle. . . . *No decree had been made in the suit.*"

Bank of South Carolina v. *Rose*, 1 Rich. (S.C.) Eq. 292 (1845).

This was a bill to foreclose two mortgages. The answers of the trustees of the property admitted that the prayer of the bill should be granted, but the answer of the purchaser of the property alleged that the mortgage set up was not an existing lien. There was *a final hearing on the merits*, and before decision by the court the plaintiff moved in court to dismiss his bill, which was denied, and a final decree entered, HARPER, Ch., saying that he had written the decree before the motion, but had not filed it, and that a cross-bill had been filed two days before the motion.

But he also said, —

> "The general rule is as contended for, that a plaintiff, at any time before decree, perhaps before the hearing, may dismiss his bill as of course upon the payment of costs. The exception, stated in general terms, is that it is within the discretion of the court to refuse him permission so to do if the dismissal would work a prejudice to the other parties; and I gather from the cases, compared with each other, *that it is not regarded as such prejudice to a defendant, that the complainant, dismissing his own bill, may at his pleasure harass him by filing another bill for the same matter*. But whenever *in the progress of a cause* a defendant *entitles himself to a decree*, and a dismissal would put him to the expense and trouble *of bringing a new suit* and making his proofs anew, such dismissal will not be permitted."

This latter remark is obviously only applicable to the case of a cross-bill.

Conner v. *Drake*, 1 Ohio St. 166 (1853).

This was a bill for specific performance of an agreement to convey an interest in real estate, for which it was agreed the plaintiff should pay damages to be assessed by arbitration. After issue joined, while the case was in progress in court, the parties agreed that such damage should be fixed by three arbitrators, who were appointed and made an award, to which exceptions were taken, and the award was set aside. Then the arbitrators made a second award, which was also set aside on exceptions; and they then made a third award to which no exception was made. The plaintiff then moved to dismiss his bill without prejudice, and the motion was refused. It is true that the court also said, —

> "After a defendant has been put to trouble and expense in making his defence, *if in the progress of the case rights have been manifested that he is entitled to claim*, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interest to dismiss his bill. Such a mode of proceeding would be trifling with the court as well as with the rights of the defendants."

Howard v. *Bugbee*, 25 Ala. 548 (1854).

Here leave to dismiss before decree was refused, because the English rule had been adopted in Alabama. But the court said that, previous to the adoption of that rule, the plaintiff had a right to dismiss, as a matter of course, at any time before decree.

Cozzens v. *Sisson*, 5 R.I. 489 (1858).

There the complainants moved to dismiss their bill, which

was for an account, *after a decree entered upon hearing dismissing the bill as to certain breaches of trust charged in it, and ordering an account to be taken by a master.*

The court denied the motion, saying that, —

> "From early times the established practice has denied the plaintiff the right to dismiss his bill, though with costs, *after a decree upon the merits*, without consent, whether the decree be final or interlocutory only. The decree binds all parties to it, is the right of all parties, and either may have the orders necessary to carry it out. And certainly no man can, of right, renounce that in which others are interested as well as himself. In the present case, after hearing upon full proofs, the bill, which is for an account, *has been ordered to be dismissed* as to the breaches of trust charged, and is before a master *under an order* to take an account between the parties. *To such a decree* the reason above stated is specially applicable; for it is well settled that *both parties are actors under it*, and that *either* is entitled, according to the result, to the aid of the court to recover the balance that may be found in his favor."

Babb v. *Mackey*, 10 Wis. 371 (1860).

Here the plaintiff brought a suit for damage by reason of building and maintaining a dam across Baraboo river, whereby the plaintiff's lands were flowed. The defendant pleaded the proceedings in a suit in equity between plaintiff and one Reed; the plaintiff replied that he had dismissed the bill after a trial of a feigned issue, and verdict by the jury. The defendant demurred to the replication.

Cole, J., said, —

"The general proposition is laid down in the books that *the plaintiff may move to dismiss his own bill with costs, as a matter of course, at any time before decree.*"

But as the replication *did not aver the payment of costs* upon the dismissal of the equity suit, it was held bad.

Saylor's Appeal, 39 Pa. St. 495 (1861).

Here Saylor agreed to convey the ore under the surface of his farm to Hicks and his assigns, and made a deed in pursuance of the agreement. He then brought a bill to set aside the deed, on the ground that it was obtained by fraud. The defendant filed an answer; the cause was sent to a master, who filed a report; and then a supplemental bill and answer were filed, and a feigned issue directed to a jury, upon which a trial was had and a verdict returned for the defendant.

The plaintiff, after the defendant had moved the court for a decree, moved for leave to dismiss his bill, which was refused.

This was sustained on appeal.

STRONG, J., saying, —

"Nor is there any merit in the objection that the court refused to permit the complainant to withdraw his bill, when the motion for a final decree was made. . . . *It is a general rule in a court of chancery that a complainant may move to dismiss his own bill with costs at any time before the decree, and it is a matter of course to permit him to dismiss it;* and even upon the hearing of the cause, if the court has merely directed an issue, the plaintiff may, before the trial of the issue, obtain an order to dismiss the bill with costs, because the directing of an issue is only to satisfy the conscience of the

court, preparatory to its giving judgment. But the rule is not so after the issue has been tried and determined for the defendant. The plaintiff cannot then move to dismiss, because the defendant is then entitled to have the cause set down for a hearing in order to obtain a formal dismissal."

Purdy v. *Hensly*, 97 Ill. 390 (1881).

Here issue was joined, cause was heard by chancellor, and he orally announced his decision in favor of the defendants; and thereupon, before any decree was entered, the plaintiffs asked leave to dismiss, which was opposed by the defendants, but granted and sustained on appeal. The Illinois statute provided that a complainant should not dismiss after a cross-bill, without consent of the defendant. The court held that in any case where there was no cross-bill the complainant had the right to dismiss at any time before a decree was entered, citing *Mohler* v. *Wiltenberger*, 74 Ill. 163.

Tift v. *Keaton*, 78 Ga. 235 (1886).

Here Keaton sued one Robinson, as principal, and one Vason, as surety, on a promissory note, and obtained judgment by default. Execution was levied on cotton belonging to Vason. The Tifts then set up a claim to the cotton, which they withdrew, and then filed a bill in equity alleging that they had a lien on the cotton as commission merchants, for money advanced to Vason, and asked that their lien be enforced as superior to the execution levy, and also for an injunction to restrain Keaton from suing them for having claimed the cotton and then withdrawn their claim. The answer prayed *for an affirmative decree* against the Tifts, establishing the priority of the execution levy over the lien of the Tifts, and requiring the Tifts to pay the amount of the

execution and costs. When the case came on for hearing, the plaintiffs moved for leave to dismiss, which was denied, and on appeal the ruling was sustained, the court saying, —

> "We are of opinion that the court ruled right in refusing to allow the complainants to dismiss their bill. . . . The *answer of the defendants was a cross-bill*, and the complainant in the original bill could not dismiss that bill so as to defeat any rights which the defendant might have under the cross-bill."

Bynum v. *Powe*, 97 N.C. 374 (1887).

Here it was held that a plaintiff could dismiss or become nonsuit in an action for equitable relief by injunction, after a preliminary injunction had been granted and then dissolved upon hearing. The court stated the law thus:

> "The plaintiff may, no matter what may be the nature of the cause of action, voluntarily submit to a judgment of nonsuit, except in cases purely equitable in their nature; he cannot do so after rights of the defendant in course of the action have attached that he has the right to have settled and concluded in the action. Thus, if an order of reference has been made, *and the referee has made a report, the correctness of which is conceded by both parties, and the case is in condition to be disposed of finally, or if an account has been taken and report made, or a decree has been made under which the defendant has acquired rights*, the plaintiff will not be allowed to suffer a judgment of nonsuit, and this is so because the defendant has acquired such rights and advantages in the action as give him a positive interest in it."

Reilly v. *Reilly*, 139 Ill. 180 (1891).

In this case, after issue joined, the cause was referred to a master, who filed a report, to which exceptions were filed by the plaintiff; and "*while the cause was pending on exceptions to the master's report*" *the plaintiff moved to dismiss the bill*, which the court denied. A final decree was then entered, and upon appeal reversed, upon the ground that the plaintiff *had a right to dismiss her bill after the master's report was filed, and before it was confirmed and a decree entered.* The court saying, quoting from a previous decision in *Mohler* v. *Wiltenberger*, 74 Ill. 163, —

> "We understand the practice to be well settled that the complainant, at any time prior to a decree, has a right, unless a cross-bill has been filed, to control the fortunes of his own bill and dismiss it as a matter of course."

The court also said that, —

> "cases holding that the chancellor has a discretion and may, in certain cases likely to work a hardship to a defendant, refuse to allow a complainant to dismiss his bill are not in harmony with the current of authority."

In *Badger* v. *Badger*, 1 Cliff. 237, Mr. Justice CLIFFORD said that the right to dismiss in equity is, like the right to become nonsuit at law, absolute up to the time when there has been a decision by the court, or a hearing has begun upon which the court may decide the case upon the merits; and at law it is often allowed even after argument. The cases when nonsuit is allowed at law are therefore instructive.

DECISIONS AS TO RIGHT TO BECOME NONSUIT AT LAW.

At common law prior to A.D. 1400, a plaintiff could become nonsuit as of right at any time before judgment, even after verdict, but in that year this right was limited by statute (2 Henry IV. c. 7), so that after a verdict was rendered he could not become nonsuit. This right to become nonsuit at any time before verdict, was the common law at the time of the Revolution, and has continued to be the law, except so far as modified by statute, in nearly all the states. In some of the states the right has been expressly preserved by statute.

Wood v. *Nortman*, 85 Mo. 298.
Gordon v. *Goodell*, 34 Ill. 429.
Lawrin v. *Hanks*, 3 McCord (S.C.) 558.

This common law right was so highly regarded in Massachusetts and New Hampshire that it was expressly set forth and preserved in the body of liberties in each state.

"28. The plaintife in all Actions brought in any Court shall have libertie to withdraw his Action, or to be nonsuited before the Jurie hath given in their verdict, in which case he shall alwaies pay full cost and chardges to the defendant, and may afterwards renew his suite at an other Court if he please."

"Liberties of the Massachusetts Colonie in New England," 28, p. 3, sec. 7. (See Whitmore's Bibliographical Sketch of the Colonial Laws of Massachusetts, 1630 to 1686, p. 39.)

And the same was the provision in New Hampshire.

"36. It is also enacted yt it shall be at ye Liberty of the Plaintiff to withdraw his action at any time before

ye Judge or jury have given in ye verdict in ye case, in which case he shall pay full cost to ye Defendant."

General Laws and Liberties of the Province of New Hampshire, March 16, 1679.
N.H. Provincial Papers, vol. I. p. 406.

This right appears to have been since limited by the court, however, so that it cannot be exercised without leave of court after the cause has been opened to the jury.

Judge of Probate v. *Abbott*, 13 N.H. 21.

Fulford v. *Converse*, 54 N.H. 543.

Here the plaintiff was not permitted to become nonsuit after an auditor's report was filed, the court saying that under the statute the report was conclusive unless impeached by evidence, and therefore the plaintiff could not avoid the effect of it except by evidence, that is, by the becoming nonsuit.

Haskell v. *Whitney*, 12 Mass. 47.

Here the court recognized the common law rule that the plaintiff could become nonsuit at any time before verdict, but denied a nonsuit after a reference to referees, by a rule which provided that if either party neglected to appear before the referees they might proceed *ex parte*.

See, also, *Shaw* v. *Boland*, 15 Gray, 571 (1860).

There is no doubt, however, that at common law, except as modified in Massachusetts, Maine, New Hampshire, and in a very few other states, a plaintiff has an absolute right to become nonsuit at any time before verdict.

See *Washburn* v. *Allen*, 77 Me. 344, for a full discussion.

Jones v. *Pope*, 1 Saund. 36 (18 Car. II.).

Debt on escape. The defendant pleaded the statute of limitations; to which the plaintiff demurred, and claimed that the statute did not extend to an action founded upon tort; and an incurable defect was found in the declaration, which did not state the judgment; whereupon the plaintiff prayed leave to discontinue, which was granted, after argument.

Bennet v. *Filkins*, 1 Saund. 20 (18 Car. II.).

Debt on a bond. The defendant pleaded that he was arrested on a writ returnable on Saturday, and the plaintiff replied that he was taken on a writ returnable on Sunday and not on Saturday; whereupon the defendant rejoined that he was taken by virtue of a writ returnable Saturday, *absque hoc* that he was taken by a bill returnable Sunday, and then the plaintiff demurred, claiming that this was a double traverse. The court ruled that the rejoinder was good, but gave leave to the plaintiff to become nonsuit.

In the following cases a nonsuit was allowed after argument of a demurrer, and an expression of opinion by the court: —

Martin v. *Delboe*, 1 Lev. 298 (22 Car. II.)
Rea v. *Burnis*, 2 Lev. 124 (26 & 27 Car. II.).
Ent v. *Withens*, 2 Lev. 209 (29 Car. II.).
Stephens v. *Cooper*, 3 Lev. 440 (8 Wm. III.).

Roberts v. *Mariett*, 2 Saund. 73 (21 Car. II.).

Debt on a bond conditioned to perform an award. Defendant pleaded, after oyer, "No award made," and plaintiff, by replication, showed the award, and a breach of it by the defendant, but made a mistake in the day of tendering the award; whereupon the defendant demurred; and the plain-

tiff, having joined in demurrer, sought to discontinue, when the error was pointed out to him, which was allowed against the defendant's objection.

Henderson v. *Williamson*, 1 Strange, 116 (5 Geo. III.).

Debt upon a bond conditioned to perform an award. The defendant, after oyer, pleaded "No award made." The plaintiff replied that the arbitrator, before the day, made his award in writing, which is set out, and the breach assigned, and the defendant demurred; upon argument, the replication was held ill, as it did not allege that the award was under the hand and seal of the arbitrator, as was required by the bond.

"But the plaintiff had leave to discontinue."

Butler v. *Malissy*, 1 Strange, 76 (4 Geo. III.).

Case upon a promissory note. The declaration set forth that the defendant and another jointly and separately promised to pay. The defendant demurred. Upon argument, the court held that the plaintiff should have declared generally against the defendant.

The plaintiff then prayed leave to discontinue on payment of costs, which was granted.

Smith v. *Vale*, 2 Esp. 607 (38 Geo. III.).

Assumpsit for goods sold and delivered. Plea, the general issue, with notice of set-off, and defendant paid £30 into court.

Defendant proved a set-off exceeding the amount of the plaintiff's demand, upon which the plaintiff moved for leave to become nonsuit; defendant said that he was entitled to a

verdict because he had paid money into court and thereby precluded plaintiff from becoming nonsuit.

Lord KENYON said, however, that no such operation could be attributed to the paying of money into court; and the plaintiff was allowed to become nonsuit.

The People v. *The Mayor's Court of Albany*, 1 Wend. 36 (1828).

Here, on a motion for a mandamus to the court below to amend the record of judgment in a cause, it appeared that after the cause had been given to the jury, the presiding officer informed the parties that the court would take a recess, but would attend to receive the verdict, which the court, under the impression that the parties had assented, did in the absence of the parties. The verdict was for the defendant, and was entered. The mandamus was granted, WOODWORTH, J., saying, —

> "Nothing less than express assent could have warranted the taking of the verdict in the absence of the plaintiffs. Such assent could not be inferred from their silence. Besides, it is evident that the plaintiffs wished to be present at the coming in of the jury, *which might have been desired for the purpose of submitting to a nonsuit, a right the plaintiffs were entitled to.*"

Wooster v. *Burr*, 2 Wend. 295 (1829).

Motion to set aside nonsuit in an action of assumpsit where the defendant pleaded set-off. The case was tried, and the jury came back into court prepared to render a verdict for the defendant, but plaintiff did not appear, and was therefore nonsuited. The defendant then moved to set the nonsuit aside.

SAVAGE, C.J., said, —

> "There is nothing in the statute [of set-off] which changes the rights of the parties," and denied the motion.

To same effect is *Cummings* v. *Pruden*, 11 Mass. 206, decided before the Massachusetts statute preventing a plaintiff from discontinuance after set-off filed by defendant.

Sec. 21, c. 130, Mass. Gen. Sts.

Branham v. *Brown*, 1 Bailey (S.C.) 262 (1829).

Assumpsit. The pleas were payment, and discount exceeding plaintiff's demand. When the evidence was closed, the plaintiff moved for leave to discontinue, which was allowed, the court saying, —

> "The plaintiff has a right to discontinue his action, or suffer a nonsuit, notwithstanding the defendant may have filed a discount."
>
> "The plaintiff in this case ought, therefore, to have been permitted to discontinue."

McCredy v. *Fey*, 7 Watts, 496 (1838).

After the evidence had all been heard on both sides, the plaintiff offered to become nonsuit. The action was founded on a due bill, and the defendant had pleaded set-off. The trial court would not allow the plaintiff to discontinue, and he excepted. The Supreme Court reversed the judgment, saying, —

> "At common law no verdict could be given unless plaintiff or his attorney was in court.
>
> "It is settled by a train of decisions that the defend-

ant's bringing the money, admitted by him to be due to the plaintiff, into court does not prevent the latter from taking a nonsuit."

Riley et al. v. *Carter*, 3 Humph. 230 (1842).

Action on a promissory note made by Riley and another, who, at the trial, introduced an account as set-off, and they had a verdict for the excess of the set-off.

The plaintiff was then allowed to dismiss his action, the court saying, —

"There is no doubt but that at common law a party plaintiff has a right to dismiss his suit whenever he may choose. He is *the only party seeking a remedy. He alone asks the action of the court. The defendant stands in the attitude of resistance.* He opposes the action of his adversary, and endeavors to defeat the suit. If the plaintiff voluntarily comes and withdraws his suit, it is all the defendant can ask."

McCann v. *Boyers*, 8 B. Mon. 285 (1848).

Action upon account. The defence was an account against the plaintiff for a greater sum. The plaintiff then became nonsuit, and the defendant moved to set aside the nonsuit on the ground that plaintiff had no right to discontinue, since defendant claimed judgment for the overplus of his set-off. This motion was overruled, the court saying that the right to a nnosuit is *like the right to dismiss a bill in chancery*.

Homer v. *Brown*, 16 How. 354 (1853).

Here the defendant pleaded that, in a previous suit by the plaintiff against him for the same cause of action in the Supreme Judicial Court of Massachusetts, they agreed upon

the statement of facts, and that the court might, upon consideration of such statement, order a nonsuit or a default, and enter judgment thereon, and that the court did order a judgment of nonsuit upon such statement and agreement. But the Supreme Court of the United States held that the plea was bad, because a judgment of nonsuit, whether submitted to voluntarily, or whether rendered by the court in conformity to agreement between the parties, was not a judgment upon the merits.

Fowler v. *Lawson*, 15 Ark. 148 (1854).

Lawson sued Fowler in assumpsit, who pleaded set-off for a larger amount than was claimed by Lawson. After some evidence was given, Lawson, by leave of court, became nonsuit, and on exceptions the ruling allowing the nonsuit was sustained.

Lowell v. *Merrimack Manufacturing Company*, 11 Gray, 382 (1858).

Here the parties submitted the case to the Court of Common Pleas on an agreed statement of facts. That court heard the case on this statement, and rendered judgment for the defendant.

The plaintiff appealed to the Supreme Judicial Court, and then moved to discharge the statement of facts and for leave to become nonsuit, which was allowed against the objection of the defendant.

Shaw, C.J., saying, —

> "If there is any danger of the defendants' losing the evidence of the facts which were admitted in the statement, they can perpetuate it in the mode provided by law."

In *Truro* v. *Atkins*, 122 Mass. 418, this ruling was approved, though the court held that a plaintiff could not become nonsuit as of right in the Superior Court after the case had been reported to and was in the Supreme Judicial Court upon questions of law.

Plant v. *Fleming*, 20 Cal. 92 (1862).

Action on a promissory note. The defendant pleaded an admission of $1100 indebtedness, and denied the balance. The case was, by consent, referred to a referee to take the testimony and report a finding of facts *and a judgment*. After both parties had rested, the plaintiff asked leave to become nonsuit, which the referee denied. After the report was filed, the plaintiff moved for a new trial, on the ground that he was not allowed to become nonsuit, which was granted.

FIELD, C.J., saying, —

> "The only question presented for determination on the appeal is, whether a plaintiff can voluntarily submit to a nonsuit before a referee after the proofs are closed in a case where no counter claim is set up by the defendant. . . . For the purposes of the trial, he [the referee] takes the place of the judge, and not only possesses the power, but upon the abandonment of the cause by the plaintiff before its final submission . . . it is his duty to grant a nonsuit, and to report his judgment to that effect."

Merchants Bank of Canada v. *Schulenberg*, 54 Mich. 49 (1884).

Assumpsit upon a Canadian judgment. The plea was the general issue with notice of set-off. Under the set-ff, the defendant claimed to be entitled to judgment. After

defendant's testimony was mostly in, the plaintiff was not allowed to become nonsuit. Upon exceptions this was affirmed.

SHERWOOD, J., said by an equal division of the court, —

> "The right of a plaintiff at common law to voluntarily submit to a nonsuit, or to discontinue his suit at any time before the jury have rendered their verdict, is well supported by the authorities."

But when, *as under our statute*, the defendant is entitled to a judgment in set-off, this cannot be so.

CAMPBELL, J., concurred, but COOLEY, C.J., and CHAMPLIN, J., dissented, COOLEY saying, —

> "The general right of the plaintiff to discontinue his suit or to submit to a nonsuit at any time before verdict, is undoubted; and in the absence of any statute taking away that right, it exists in the cases when set-off is relied upon to the same extent as in other cases."

Bryant v. *Jones*, 87 Ga. 451 (1891).

This was a bill to enjoin the defendants from ejection of the plaintiff from real estate, and for a decree affirming the plaintiff's title to an interest therein. A hearing was had and apparently closed on May 2, and the chancellor took the case under advisement until May 16, when the injunction was denied. On May 14, the court having indicated what the decision would be, the plaintiff moved to dismiss, which the court refused because it had practically decided the cause before the motion was made.

Somerville v. *Johnson*, 3 Wash. 140 (1891).

This was an action to quiet title to real estate. The

answer contained no prayer for affirmative relief. The cause was heard by the chancellor, and taken under advisement. After an intimation by the court that it would find for the defendant, the plaintiff moved to dismiss, which the court refused on the ground that the infant defendant had applied to it to protect its interests. On exception, the decision was reversed and the cause remanded, with instructions to allow the motion to dismiss.

Waite v. *Wingate*, 4 Wash. 324 (May, 1892).

This was a suit to quiet title. The answer asked for affirmative relief. Interrogatories were filed by the defendant to the plaintiff, which the plaintiff failed to answer. The defendant moved for judgment therefor, which was denied. Thereupon the plaintiff moved to dismiss his action, which was granted, and on appeal sustained, the court saying that, as there were no statutory provisions regulating the right of dismissal in equitable actions, —

> "the right exists as at the common law, which allows the complainant at any time before final decree, upon payment of costs, to dismiss his bill."

In the court below, the defendant contended that the right of a plaintiff to abandon his pursuit of the defendant is lost by the mere reference of the cause to a master; and cited in support of this proposition the following cases: —

Biscoe v. *Brett*, 2 Ves. & Bea. 377.
Collins v. *Greaves*, 5 Hare, 596.
Gregory v. *Spencer*, 11 Beav. 143.
Roberts v. *Williams*, 2 Hare, 151.
In re London Dock Company, 11 Beav. 78.

An examination of the cases will show that they do not support the defendant's contention.

Biscoe v. *Brett* was a bill to enforce specific performance of a contract to purchase land. The answer *admitted the contract*, and alleged that the plaintiff had not a good title.

Upon this admission by the defendant of his obligation to purchase, the case was referred to a master to report as to the title. While the matter was pending before the master, the defendant obtained an *ex parte* order to dismiss the bill for want of prosecution. The plaintiff moved to discharge that order, and the chancellor, Lord ELDON, held that it was not necessary to discharge the order, but that the plaintiff was at liberty to proceed as if no such order had been made, because in a case *where the contract was admitted by the answer*, and the only question left was as to the title, a practice had been established to treat the order of reference to a master to ascertain as to the title, as a decretal order, precisely as if a decree had been entered establishing the contract.

That is to say, in that class of cases where the primary question as to the obligation of the defendant to purchase *was settled by an admission of that obligation in the answer*, the practice was established of giving that admission the same effect as a decision of that question by the chancellor. In other words, the practice was established of giving the same effect to an admission of record of the primary obligation of the defendant as would have followed from the establishment of that obligation by a decree after hearing by the chancellor. The other party was treated as having, by this admission of record, acquired *a right, in the progress of the cause*, of which he could not be deprived by the dismissal of the bill without his consent. It was analogous to a prac-

tice which might be established in cases of bills to account, where, if the defendant, in his answer, admits the obligation to account, that admission of record should be given the same effect as a decision by the chancellor of the defendant's obligation to account. In reality, *the admission* of the obligation to account should have the same effect as a *decree* to account.

This class of cases, however, stand not upon the ground that the order of reference to a master in equity deprives the plaintiff of the right to dismiss his bill, but upon the ground that an admission of record by the defendant of the obligation alleged in the bill may be given the same effect as an interlocutory order of the chancellor establishing the obligation.

In *Biscoe* v. *Brett*, the order of reference to a master was held to have the effect of a decretal order, not simply because it was a reference to a master, but because it was based upon an admission of record of the obligation set up in the plaintiff's bill. The court say that whenever an order of reference to a master was made upon such an admission of record the parties should be considered in the same situation as to the further progress of the cause as though, instead of an admission of record of the obligation set up in the bill, there had been a decree of the chancellor establishing that obligation. To make that class of cases like the case at bar it would be necessary that the answer should deny the contract, as the answer in this case denies it. To make this case like *Biscoe* v. *Brett*, and other cases of that class, the defendant should have admitted in its answer the obligation to account, and then, upon that admission, there should have been a reference to a master to state the account. In such a case it might well be held that the admission of the obligation to account should

be given the same effect as an interlocutory decree to account.

In *Collins* v. *Greaves*, publication had passed, and there had been a reference to a master upon the admission of obligation, as in *Biscoe* v. *Brett*.

In *Roberts* v. *Williams*, the master's report had been filed, and the plaintiff had obtained an order *nisi* to confirm the report, and served it upon the defendant, but had allowed the time within which the report might be confirmed absolutely, upon motion under the rule, to expire. The defendant moved, *ex parte*, that the report might be confirmed, which the court allowed. It is submitted that this case has no application to the case at bar, where the report was not even completed by the master at the time the motion to dismiss was made.

In re London Dock Company was a case where money had been paid into court for the benefit of heirs, and a reference had been made to a master to ascertain who were the heirs. The master made his report in part, and an order was then entered directing him to make further inquiry. A petition was presented by one of the parties, praying for a further reference as to other matters, and for the production of papers. The master of the rolls, Lord LANGDALE, held that the petition was misconceived, as the existing reference to the master was sufficient.

It is submitted that this decision has no application to the question raised in the case at bar. An interlocutory decree had been entered, and then a reference had been made to a master, who had reported, and all that the court held was that, after the case had reached that condition, either party

might take advantage of any further report the master should make.

Gregory v. *Spencer* was the case of a reference to a master to look into a title upon an admission in the answer that the defendant was obliged to purchase.

Moscher v. *Reed*, 1 Ball & Beatty, 320, was cited by the defendant in the court below as an authority to the point that, while a case is on trial before a master, the plaintiff has no right to dismiss his bill. It is an authority to that point in a cause where there has been a decree to account, as was the case there. That case was a bill to account. A decree was entered to account, and then a reference was made to a master to state the account. Pending the proceedings before the master, the plaintiff sought to bring an action at law, and the chancellor held that, after the decree to account had been entered, the subject matter of the cause had been attached in that court, and the plaintiff could not, as a matter of right, abandon that suit and proceed at law.

This case, it is submitted, is very far from being an authority that the plaintiff in a bill to account cannot dismiss before a decree to account has been entered, merely because the cause is pending before a master to ascertain the facts upon which the chancellor may make such a decree.

Ogsbury v. *LaFarge*, 2 Comst. 113, was cited by the defendant in the court below, to the proposition that if evidence has been taken and published, a dismissal of the case is a bar to a second suit. That case was a suit to compel the specific performance of a contract to convey land. The defendant answered. Issue was joined, no proofs were taken, but publication had passed, and then the defendant brought the case to a hearing, and the complainant made default.

Subsequently the complainant brought another suit for the same cause. The question was raised before Chancellor KENT whether the dismissal of the original bill was a bar to the second bill, and he held that it was not.

Rosse v. *Rust*, 4 Johns. Ch. 300.

Upon appeal in the Court of Appeals, BRONSON, J., said that he took the same view of the matter; but the other judges were of the opinion that, as the bill was dismissed after publication had passed, it was the same thing in legal effect as though the cause had been brought to a hearing on pleadings and proofs, and therefore the first suit was a bar to the second. Considering the character of the judges who held to the contrary, this case is of doubtful authority even to the proposition that, after publication is passed, the case set for hearing, and the defendant makes default, whereby the suit is dismissed, it is a bar to a second suit. But the case is certainly not an authority to the proposition that the plaintiff loses the right to dismiss by the mere reference of a case to a master, without any order of the court fixing the rights of the parties in any respect whatever.

Folger v. *The Robert G. Shaw*, 2 Wood. & Min. 531, was cited by the defendants below, and it was claimed that the decree of the Circuit Court permitting the plaintiffs to dismiss in the case at bar was contrary to the practice there laid down by Judge WOODBURY. As we read the case, the contrary is the fact. *Folger* v. *The Robert G. Shaw* was a libel in admiralty. The libellant appealed from a decree in his favor in the District Court to the Circuit Court, and then asked leave to dismiss in the Circuit Court without prejudice to the right to bring another suit. The Circuit Court refused to grant such leave, upon the ground that the

decree below, although technically vacated by the appeal, was still in existence as a guide to the Circuit Court for a decree in case the libellant abandoned his appeal. The court stated, in its opinion, again and again, the rule that a plaintiff could abandon his suit at any time before the merits could be ascertained by the court.

Judge WOODBURY says that a discontinuance or dismissal is a matter of right if the progress in the case "has not furnished means to the court for a correct final decision."

Again:

> "This act [*sic*, dismissal] must be at some period before the merits can be ascertained for a final judgment. . . . The true test seems to be the progress in the case, so that the *court* have means to decide on the merits."

Again:

> "In chancery, the evidence must be put in so far as to enable a decision on the merits to be made."

Reference is made in this case to the rule of the Supreme Court, that if one party to a cause does not appear to argue it, the other has a right to proceed and ask for judgment on the record.

Siglar v. *Heywood*, 8 Wheat. 677.

Reference is also made to the practice, in cases of appeal from judgments of justices of the peace and from county courts to the Supreme Courts in New England, to enter an affirmation of the judgment below upon the complaint of the other party, if the appealing party does not enter the appeal.

Reference is also made to the practice in the House of Lords, where, after an appeal is entered, if the appellant does not appear, the appellee may have the appeal dismissed.

Sherburne v. *Milltown*, 9 Clark & Fin. 72.

And the suggestion is made that this practice probably arises from the fact that, by an appeal to the House of Lords, the judgment below is not superseded. An examination of Judge WOODBURY's entire opinion shows clearly that it falls very far short of being a decision that the mere reference of a case to a master before the report of the master is filed, and before the court has anything before it upon which it can adjudicate the merits, deprives the plaintiff of the right to abandon his suit.

The fair inference from the entire opinion is that, until the master's report is filed and confirmed, so that the court can adjudicate the case upon the merits on the basis of it, the plaintiff may abandon his suit.

GENERAL RULE SHOWN BY THE CASES.

The rule to be deduced from all these cases is that, to deprive the plaintiff of the right to dismiss, that is, *of the control of his own suit*, the defendant must, either in his answer or by a cross-bill, *claim relief against the plaintiff*, or must *in the progress of the cause* have *acquired a new right against the plaintiff*, so that, if the plaintiff ceases to prosecute his suit and makes default, the chancellor upon that default can, *upon the record as it then stands, without further hearing, adjudge the merits of the issue joined*.

Until this has been done, the defendant suffers no legal injury by the plaintiff's dismissing his suit, for "the theory

of the law is that the taxable costs furnish a full indemnity to him for all his expenses incurred in the suit."

Henry v. *Davis*, 123 Mass. 345 (1877).
Faneuil Hall Ins. Co. v. *Liverpool &c. Ins. Co.*, 153 Mass. 63–73 (1890).

In the case at bar it was not necessary to consider whether a plaintiff has a right to dismiss his bill before determination of any part thereof upon the merits, where a cross-bill has been filed by the defendant, under which the defendant seeks affirmative relief, or where the answer prays affirmative relief, or where the defendant could ever have on the pleadings any decree except one dismissing the bill. No such question arose here.

Nor was it necessary to consider whether the right to dismiss is lost by the acceptance of the verdict of a jury upon an issue framed, or by the confirmation of the report of a master, or even whether it is lost by the rendering of such a verdict, or the making of a report by a master. In such cases it may perhaps be said that as the verdict or the report have *become of record*, so that the chancellor can decide the case on the merits upon them, the defendant has thereby acquired the right to have him decide it, and that this is a new right acquired in the progress of the cause, of which the plaintiff cannot deprive the defendant by dismissing the bill.

But no such question arose here, for there was no report of record when the motion to dismiss was made, and in fact *no report then existed*. The question of what the report should finally be was then pending and being argued before the master himself, and his draft report, or suggestion of what he intended to report, was in fact modified in material respects, even after the motion to dismiss was filed.

The attitude of the case was no different from what it was

at any time after the reference was made to the master, or the hearing before the master began, or after the master had expressed an opinion upon the merits of the cause in the progress of such hearing.

The question here was really only whether, *by the mere reference* of a case to a master to report the facts, with such part of the testimony as either party requests, and his rulings of law, the plaintiff *loses his control of the suit and his right to dismiss it upon payment of costs.*

Here, the master, instead of submitting a draft report to counsel, as it was understood between counsel and himself he should do, inadvertently filed his report without submitting a draft report to counsel, and it was immediately taken from the files and treated as not filed; and thereafter the case remained before the master and was considered by him from time to time, from the twentieth day of February, 1891, until the eleventh day of August, 1891, *or nearly six months.*

In the mean time, on the first day of June, while the matter was pending before the master, *and two months and eleven days before he filed his report*, the plaintiffs filed motion to dismiss the bill, and gave notice thereof to the defendant, and also, on the third of June, gave to the master a copy of the notice and requested him to make no report in the cause pending the decision of the motion.

The subsequent action of the master in filing his report in disregard of this request could have no possible bearing upon the question of whether the motion should be allowed. The question was whether the plaintiffs had a right to dismiss the bill *when the motion was filed.* If they had, that right could not be taken away by any subsequent action of the master against their objection.

When the motion was filed there had been no action whatever by the court, except the mere formal action of referring the case to a master upon agreement of the parties. There had been no determination of any part of the cause, upon the merits or otherwise. There had been no order or determination by the court which fixed the rights of the parties as to any portion of the cause on the merits. The order to refer was merely a step in procedure, which fixed nothing except *the method of bringing to the court the facts and evidence so that it could decide upon the merits of the cause.*

The bill is for an accounting. If the court had considered the question and decided that the plaintiffs were not entitled to an accounting, that would have been a decision of the whole case upon the merits. If the court had considered the case and determined that the plaintiffs were entitled to an account, that would have been a determination of a portion of the cause upon the merits, and would so far have fixed the rights of the parties that the plaintiffs could not afterwards dismiss as of right.

But upon the record as it stood when the plaintiffs moved to dismiss their bill, or even as it stood when the decree to dismiss was made, the defendant had no right which it could lose by the dismissal, because there had been no order passed which fixed the rights of the parties in respect to the merits of the case in any particular. When the motion was filed, there had simply been a formal reference, by agreement of parties, to a master, for the purpose of bringing to the court the facts and evidence, upon which *the chancellor* might determine either that the plaintiffs were not entitled to an account, which would dispose of the whole case upon the merits, or that they were entitled to an account, which would dispose of the primary part of the case upon the merits.

The order of reference evidently did not contemplate that

the master should state an account, but only that he should report the evidence and facts upon which the court might decide whether the plaintiffs were entitled to an account.

Even the final report of the master would not itself have been a *determination* of any part of the cause, or even a basis for such determination by the chancellor, until it was confirmed. The final report of a master is not, until confirmed by the court, a determination of any part of the cause. A master's report is only to inform the conscience of the court. It determines nothing finally. It merely gives information to the court upon which it can determine. In this case, it is obvious from the terms of the order that it was expected that the master's findings of fact might be revised upon the evidence, because the order directs him to report all the evidence that either party may request.

It is not necessary, however, to go so far in support of the decree of the Circuit Court as to claim that a bill may be dismissed after a master's report, for in this case there was, at the time the motion was filed, no report. And this the Court of Appeals concede and hold.

The draft report of the master, which was inadvertently filed by him, and immediately taken from the files by the consent of all parties, *and "considered as not filed,"* was simply *a suggestion to the parties that the master proposed to make such a report.* It was open to change by the master, in whole or in part, to any extent and in any manner; and it was in fact changed in material respects after the motion to dismiss was filed, and notice thereof given to the master, as his subsequent report shows.

The draft report was inadvertently filed on the nineteenth of February, 1891. It was taken from the files, and treated as not filed but as a draft report, on the next day. It was in the hands of the master, *subject to his power to modify and*

change it, until the eleventh of August, i.e., for two months and a half after the motion to dismiss was filed and he was notified thereof, and he did modify it in material particulars after that notice.

A draft report is simply a suggestion by the master that he *intends* to report certain facts to the court. It is nothing but a declaration of intention, subject to change to any extent. It is no more binding upon the master, and no more fixes the rights of the parties even before him, than any oral suggestion by him in the progress of the hearing that he thinks certain facts are or are not proved.

A master, even after he has submitted a draft report to counsel, may conclude to have further hearing, to receive further evidence, or, in fact, to retry the whole case.

In short, a master's draft report is simply *an intimation to counsel that upon the cause, so far as it has been heard*, he is of opinion that certain facts have been proved, and *intends, unless he changes that opinion*, to report them to the court as proved.

Until the master finally signs and files his report, there is no real "determination" even by him. Up to that time he may wholly change his views and make an entirely different finding of facts from that which it contained when submitted to counsel.

It may be suggested that "the presumption is that the master's draft report will remain unchanged." On the contrary, the presumption is that the master will change the draft report if, upon receiving and considering suggestions, it appears to him that he ought to do so.

This is the reason why exceptions must be made before the master to render them of any avail before the court.

In *Story* v. *Livingston*, 13 Pet. 359, 366, the court said, —

> "No exceptions to a master's report can be made which were not taken before the master, the object being to save time and *give him an opportunity to correct his errors, or reconsider his opinion.*"

And this statement is repeated in identical terms in the following cases: —

McMicken v. *Perin*, 18 How. 507.
Topliff v. *Topliff*, 145 U.S. 156, 173.
Pewabic Mining Co. v. *Mason*, 145 U.S. 349, 363.
Sheffield &c. R.R. v. *Gordon*, 151 U.S. 285–290.

It thus appears that the very reason for the rule that a master's report will not be reviewed by the court except upon objections made before the master is that it is to be assumed that the master will, upon such objections, correct the errors pointed out by them, or reconsider his opinion as expressed in the draft report, if he ought to do so. The purpose of objections is that the master may change the draft report, if upon consideration of them he thinks he ought to do so. The exceptions are not merely to enable the court to correct the errors of the master, but primarily *to enable the master himself to correct his own errors and reconsider his own opinions as stated in the draft report.*

That is precisely what the master did in this case. The draft report was taken from the files February 19, 1890, and thereafter various hearings were had before the master with reference to modifications of it, and he did in fact modify it in several material respects even after the motion to dismiss was made, as I have hereinabove shown by the record. So far from the master treating the draft report in this case as his final decision, he heard the parties upon the case, received

oral and written suggestions, and properly treated the draft report as a mere suggestion of what he intended to find and report as to the facts, if he did not change his mind upon suggestions and argument and reflection before he finally filed it in court as a complete report.

I repeat, that up to the time when the report was finally deposited with the clerk by the master, and passed out of the master's possession and control, it was wholly within his power to change in every respect, and was no more than a mere intimation by him that, unless he changed his mind, it was what he should report to the court. In the nature of things this must have been so.

Suppose the master had died the day after the draft report was taken by him from the files as having been filed by mistake: would there have been any master's report in this cause? Suppose, on the tenth of August, the day before the report was filed, or on the day it was filed, the master, while on his way to the court house to file the report, had been run over in the street, and killed: would there have been any master's report in this cause? Suppose, while on his way to the clerk's office to file the report, he had changed his mind as to a material fact stated in it and had gone back to his office, and, before he changed the written report, he had resigned, or been removed by the court, or died: would there have been any master's report?

As well stated in the opinion of the circuit court below: —

> "The draft report submitted to counsel by the master was in no sense a determination in the cause. He might have modified or wholly reversed his findings, upon the presentation of objections by counsel. Until his ultimate conclusions were embodied in a final report, and filed in court, he had in fact legally made no findings, and the present case is no different from what it would

> have been if the complainants had moved to dismiss their bill before reference to the master, or had moved to dismiss some time during the hearing before the master, and before the submission of his draft report."
>
> Copy, Record, p. 175.

In this case the defendant claims no relief against the plaintiffs, and the only decree it can ever have upon the pleadings is that the bill be dismissed.

This case, therefore, comes directly within the general rule as stated by the Supreme Court in *Chicago & Alton Railroad* v. *Union Rolling Mill Co.*, that —

> "A complainant in an original bill has a right at any time, upon payment of costs, to dismiss his bill subject to a distinct and well-settled exception that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings taken as *entitle the defendant to a decree*, he may not be allowed to dismiss his bill without the consent of the defendant."

It is obvious that the case does not come within this exception. No decree of any kind had been made in this case. No rights of either party had been adjudicated.

Had such proceedings been taken as "*entitled the defendant to a decree*" when the motion to dismiss was filed?

The plaintiffs offered the defendant, and the court gave it a decree, dismissing the bill without prejudice, *i.e.*, *not on the merits* and its costs.

Its complaint, therefore, is that it was then entitled to a decree *upon the merits*.

Upon *what* was it then entitled to a decree upon the merits?

What was there before the court on that day upon which it could have adjudged the merits of this cause? It is superfluous to say that the court could not, without hearing testimony itself, have adjudicated upon the basis of anything which was not of record.

If the cause had been called in court on that day, it would have been as impossible for the court to adjudicate upon the merits of the cause as it was on the day after issue was joined. The court had not been even advised by the master, and it could not even be assumed what the master would advise.

If a draft report had been in the hands of counsel and they had offered it to the court as the basis of adjudication, it could not have been received. The draft report was not even the completed act of the master at that time, but only an intimation to counsel of his *then* opinion. As a matter of fact, it was subsequently materially changed, and it might have been changed *in toto*. It was not binding upon anybody; and the defendant would not have been entitled to a decree upon the basis of it, even if it had been produced by the defendant in court, as it could not have been.

To sustain the claim that a plaintiff loses his right to dismiss when the master submits his draft report to counsel, it must be claimed that a plaintiff loses his right to dismiss *whenever the master intimates an opinion in the hearing before him.*

But it cannot be seriously claimed that the defendant is entitled to a decree upon an intimation by the master, at any time in the hearing before him, of his opinion upon the merits of the case. And yet the defendant has as much vested right in such an expression of opinion as he has in the expression of opinion by a mere draft report. The draft report is as much within the control of the master, and sub-

ject to change by him, as his opinions stated orally or in writing at any time in the hearing before him.

Suppose, for instance, a master, upon the first day of the hearing before him, upon a discussion which arises upon the pleadings, or upon the admission of evidence, or in any other way, orally, or even in writing, expresses his opinion adverse to the plaintiff upon a material part of the questions before him, it cannot be claimed that upon this the defendant is entitled to a decree, or that this expression of opinion prevents the plaintiff from dismissing his bill without logically claiming that the defendant is entitled to a decree, if the plaintiff makes default at any time after the hearing before the master begins, *i.e.*, that the plaintiff, *by entering upon a hearing before the master, loses the right to dismiss his bill*.

There is no middle ground between the position of the plaintiffs here that the defendant is not entitled to a decree, and therefore the plaintiffs can dismiss at any time before, upon the confirmed report of a master, or the verdict of a jury accepted by a chancellor, or, upon a hearing before the chancellor, the case is, or can be, adjudicated *by the chancellor*, and the position that the plaintiff loses the right to dismiss by opening his case upon the facts before the master.

But it obviously cannot be held that a plaintiff in equity, under the rule in the federal courts, loses his right to dismiss merely by opening his case before a master. Even at common law, the right to become nonsuit before verdict was absolute in England when the equity rules of this court were adopted, and it cannot be that the right of a plaintiff in equity to dismiss his bill was more limited than the right of a plaintiff to become nonsuit. Even now, in most states, the plaintiff may become nonsuit at law at any time before

verdict, and that, too, even in cases where the defendant has pleaded a counter claim.

It may be claimed, however, that a rule which permits the plaintiff to dismiss his bill at any time before the determination of the whole or a part of the cause, is inequitable. To that I reply that the rule does not exist in respect to cases where the defendant has claimed affirmative relief in his answer, or by a cross-bill, and probably not to cases in which he is entitled to such relief, although not specifically claimed in the answer, as is suggested in *Electric Accumulator Co.* v. *Brush Electric Co.*, 44 Fed. Rep. 602. It applies only in cases where, as in the one at bar, the defendant occupies a *merely defensive position*, and can in no event have any decree except that the bill be dismissed.

As applied to such cases it is not inequitable, especially if it held that the plaintiff may be required, under circumstances which the court think require it, to stipulate that the defendant may use testimony which has been taken up to the time of dismissal in any new suit by the plaintiff for the same cause, which was done in this case without objection by the plaintiff. The mere fact that the plaintiff may bring a second suit for the same cause of action, does not make it inequitable for the plaintiff to pay him his costs in the first and permit him to go. *The defendant certainly has no vested right in the plaintiff's pursuit of him.*

The law assumes, for reasons which, taking into account the administration of justice in all cases, are undoubtedly sound, that the costs which it has established to be paid by the plaintiff if his suit is not maintained "furnish a full indemnity for all his expenses incurred in the suit."

Assuming this to be true, as the court is bound to do, how is the defendant to be harmed by permitting the plaintiff to pay him the costs and stop the suit?

It may be suggested that the plaintiff may have made mistakes in the conduct of his cause; that he may have neglected to show facts which are essential to his case; that he may himself have taken evidence which is in fact injurious to him and beneficial to the defendant, but which the defendant could not himself put in.

But how does this affect his right to pay the defendant his costs and permit him to go? *Has the defendant any vested rights in the plaintiff's mistakes?* Is it not, on the contrary, inequitable that the plaintiff should be compelled to go on with a case which, by accident, misinformation, or lack of information, he finds he has failed to make as good as the actual facts would warrant?

The fallacy underlying the whole argument that the rule is inequitable, is in the assumption that a defendant, who *stands in a purely defensive position*, is harmed by being paid his costs and permitted to go out of court before he is entitled to a determination of the cause by the court upon the merits.

If, at the time the plaintiff offers to pay the defendant his costs and permit him to go, the defendant is then entitled to a decree upon the merits of the cause, the defendant may well say, "I do not choose to give up the decree to which I have become entitled," and the plaintiff cannot, by dismissing the bill, compel him to do so. But if, on the contrary, the defendant is not then entitled to a decree upon the merits, it is not inequitable to require him to take the taxable costs which the law has fixed as his indemnity up to that time, and go.

He has not been harmed in such case by what has been done up to that time. *The dismissal of the bill places him in exactly the same position that he would have been in if no suit had ever been brought.* The lapse of time has probably

affected his capacity to defend the second suit less than it has affected the capacity of the plaintiff to maintain the second suit. He has claimed in his suit nothing *except the right to be let alone*, and the dismissal of the bill leaves him in the position of having been let alone up to that time, and precisely as well off, in the eye of the law, as though he had never been sued. Surely it is less inequitable for him to be left in that position than for the plaintiff to be required to go on with a cause with which counsel advise him it is contrary to his interests to proceed.

It may be said that if a plaintiff in equity may dismiss his bill after the submission of a draft report, a plaintiff in equity will *always* dismiss his bill instead of filing exceptions. There are various answers to this suggestion.

In the first place, final exceptions are not filed before the master upon the submission of his draft report to counsel, but in court after the final report is filed, and upon the basis of exceptions taken before the master; and the plaintiff cannot certainly know by the draft report what the final report of the master will be. The purpose of the submission of a draft report is that the parties may suggest to the master in what respect they think it should be modified. This they may do orally or in writing, as the master may permit. There is no limitation upon the extent to which the entire cause may be reargued before the master after the draft report is submitted to counsel, except such as he may impose; and, in practice, the whole question is frequently reargued before the master after the draft report is submitted to counsel, and in many cases the master reopens the hearing and receives new evidence after the discussion of the draft report. To say, therefore, that, if the plaintiff can dismiss after he knows what the draft report is, he will do so in all cases rather than file exceptions, is to say that in all cases

the plaintiff will assume that the master will not modify the terms of his draft report on any suggestions which can be made in reference to them.

In the second place, in most cases, the plaintiff, although he might be dissatisfied with the draft report, and even feel that the master was not likely to modify it upon objections or suggestions made to him, would also feel satisfied with the fairness of the master, and that he had put in evidence before the master all the testimony which could be adduced in support of his case; and as by the terms of most orders of reference he would have the right to have the testimony reported to the court for its revision of the master's findings, he would hesitate to abandon his case, lose all the expenses he had incurred, and pay the taxable costs of the defendant, for the mere purpose of commencing another suit. It would only be in rare and extreme cases where the plaintiff felt that his case had not been fully presented before the master, or that the master had not fairly considered the case, or was biased or prejudiced against him, that the plaintiff would desire to abandon all he had done, and pay the costs of the defendant for the mere chance of beginning again.

But the conclusive, practical answer to this suggestion is found in the fact that cases are rarely referred to a master until after the plaintiff's right to dismiss has been lost by an interlocutory order, and it may be observed in passing that the same is true in respect to verdicts upon feigned issues. The chancellor rarely asks the advice of a master, or seeks the determination of an issue of fact by a jury, until there has been an adjudication of the rights of the parties upon a part of the merits of the cause.

The certificate of the clerk of the Circuit Court, hereto annexed, shows that of all the equity cases pending in 1874, or since brought in the first circuit up to the time of the

hearing of the motion to dismiss below, four hundred and eleven have been referred to masters, and that of these *only twenty-six* have been referred before a decree or decretal order fixing the rights of the parties as to a part of the merits of the cause. Of the twenty-six referred before such a decree or order, nine were petitions for contempt for alleged violation of decree; six were petitions for separate costs; two were for infringements of copyrights, and referred to take the evidence of authorship; one was referred upon exceptions to answer for insufficiency; one was a bill to enjoin a mortgagee's sale, and was, after a restraining order, and the payment of money by one party to the other under an agreement in the cause as to the time and manner of sale, referred to a master to ascertain the amount due on the mortgage; one was a bill for an account, and an injunction, and a receiver, and, after money was paid into court by an agreement in the cause, and a receiver had been appointed and had filed three accounts, was referred to a master "upon all issues, and to state an account;" one was, by agreement, referred, together with a suit at law between the same parties, to a referee to determine all the controversies in the litigation, with power to settle the form of the final decree in the equity case; and *five only*, of which this cause is one, were referred to masters to find the facts and report the evidence.

It thus appears that in only *five cases out of four hundred and eleven*, or out of all which were pending in 1874, or were brought in the eighteen years thereafter, could the plaintiff have exercised the right to dismiss after a draft report, and there is no reason to apprehend anything different in the future.

The case at bar is a bill for an account, but it hath not been decreed that the plaintiff is entitled to account, and

therefore the defendant is not "an actor," as the court in *Cozzens* v. *Sisson* (5 R.I. 489) declared the defendant was there, by virtue of the decree to account. In that case the motion to dismiss was denied solely because, *by a decree upon the merits*, the defendant had acquired a right to an account, had become "an actor," and was no longer in a purely defensive attitude toward the plaintiff's claim. In this case the motion was properly allowed by the Circuit Court, because there had been no decree of any kind by which the defendant had become an actor, or had changed or could change its purely defensive attitude towards the plaintiff's claim.

It may be urged that a rule which permits the plaintiff to dismiss after a draft report has been submitted to counsel, or the master has substantially indicated, at any stage in the proceedings, his opinion upon the merits of the cause, in whole or in part, is inequitable, because it would "permit the plaintiff to try its hazard of new fortunes" where it has once failed, and that such a rule would be specially unfair as applied to this case, where the plaintiffs have the advantage of discovery already obtained in the answer under oath.

It is obvious, however, that under the English practice in 1842, which is the rule of this court, the fact that the plaintiff has obtained an answer under oath does not, of itself, deprive him of the right to dismiss. This was distinctly held in *Stevens* v. *Railroads*, 4 Fed. Rep. 97, 109. And in this court it was not until the amendment of the forty-first rule in 1871, that the plaintiff could waive oath to the answer, so that all the decisions permitting the plaintiff to dismiss, prior to that date, at least, were in cases where the defendant had answered under oath.

It may also be suggested that to permit the plaintiff to

dismiss would be to subject the defendant to risks to which the plaintiff would not be subjected, and would therefore be inequitable. To this I reply, —

First. That this suggestion, if sound, would require that the plaintiff should not be allowed to dismiss at any time after the defendant has been served with process, and would also require that the plaintiff should not be allowed to become nonsuit at law at any time after the defendant has been served with process, because a defendant, either in equity or at law, cannot terminate the cause and go out of it without the consent of the plaintiff. And if the plaintiff cannot go out of court because the defendant cannot do it, *i.e.*, if the plaintiff is to be prevented from paying the defendant his costs and permitting him to go, because he would thereby be permitted to take his chances up to the time when he does pay the costs and permit the defendant to go, while the defendant would not be permitted to take his chances, *which is the exact result of this contention*, then the plaintiff ought not to be permitted to dismiss or become nonsuit at any time without the consent of the defendant.

The fallacy of this suggestion lies in the assumption that a defendant, *who occupies a purely defensive position*, has *put something at risk* which he would lose if permitted to take his costs and go before he is entitled to a decree.

But a defendant who simply says, "I ought not to have been called into court at all, and therefore ought to be permitted to go with my costs," which is all that the defendant in this cause has said by the pleadings, or can say, *has put nothing at risk*, and loses nothing by the plaintiff's stopping the pursuit, which the defendant says ought not to have been commenced, before the case is or can be determined by the court.

Assuming, as we must, that the taxable costs are an in-

demnity for the expenses incurred by a party defendant, and conceding, what may perhaps be true, that the court has the power to require a plaintiff, as a condition of the exercise of his right to dismiss, to stipulate that evidence which the defendant has taken and cannot probably again obtain shall be used in any second suit for the same cause of action, it is impossible to state anything which the defendant has put at hazard, or will lose, in contemplation of law, by being required to take his costs and go without any decree against him.

He is no more likely to be sued again than he ever was, and therefore, as the cases all agree, the fact that he may be again sued deprives him of no right, and is no prejudice to him.

The costs which he receives are, as the cases all agree, in contemplation of law a full compensation for the expenses which he has incurred. And if, in addition to his costs, which cover the expenses of all the testimony which he has taken, such of the testimony as he cannot probably again procure is preserved to him, as it was in this case by a stipulation required in the order of dismissal, he not only suffers no legal damage, is deprived of no legal right, *but is relieved, in case of a second suit, from the expense of procuring a portion, at least, of the proofs required to meet it.*

It may be urged that it would be an unfair and inequitable use of the agreement under which the draft report was withdrawn from the files, for the defendant to move to dismiss before the final report was filed.

It is difficult to answer a suggestion so absolutely without foundation as this. It is conceded that the draft report was placed on file by a mistake. It was withdrawn from the files for that reason, that is to say, because it ought not to have been filed. The agreement was —

> "It was agreed that the paper filed in this case as the master's report shall be taken into his custody and *considered as not filed.*"

Could any form of words more clearly show that the paper was understood by both parties to be not a report but a paper filed as a report, when in reality it was only a draft report? How can it possibly be said that this agreement should estop the plaintiff to treat the paper precisely as the agreement stated it should be considered, that is, *as not filed?* How can it be said that an agreement that a paper which was accidentally and by mistake put where it ought not to have been put should be taken out of that position and treated *as though it had not been placed there*, has any effect except to correct the mistake and the accident? Does anybody suppose that if, instead of filing this paper by mistake, the master had sent copies of it to the parties as his draft report, anything different would have been done in respect to it than was done? Upon what basis of fairness can it be claimed that an agreement which was merely to correct a mistake and an error has any other effect than to correct that mistake and repair that error?

The plaintiff, in making its motion to dismiss, was not taking advantage *of the agreement* by which the mistake which the master made in placing his draft report upon file was corrected. It was simply exercising its right to control its suit and abandon its bill at any time before the master's final report was filed. If it could have done that, if the master had not made the mistake of placing his draft report on file, it could do it precisely the same when the master filed his draft report by mistake, and it was withdrawn as so filed under an agreement which provided that it was to be considered "*as not filed.*" The fact that this mistake was made

and was corrected by agreement makes neither for nor against the plaintiff's right to dismiss its bill before the master's final report was filed.

It may perhaps be claimed that the agreement under which the master was appointed, and the order appointing him, in this case gave him larger powers than an ordinary rule of reference gives to a master, and really authorized him to determine the issues in the case.

And it may be urged that the master's draft report was an adjudication which gave the defendant a new right acquired in the progress of the cause similar to that which would have been acquired if the chancellor had himself heard the cause and rendered an oral decision, which only required to be put into the form of a decree to be an adjudication, as was the case in *Bank of South Carolina* v. *Rose*, 1 Rich Eq. 292.

This suggestion is obviously not well founded. The agreement did not contemplate, nor did the order provide, that the master should have any different powers from those which a master has by an ordinary reference. It is true the entire cause was referred to him, and he was clothed with power "to report" all the facts. But he was to report the evidence, and his power to determine the facts was no greater than the power of a master to determine any fact which he may be directed to report to the court.

The only difference between the power of the master under this agreement and reference and the power of a master who is directed to report a single fact, is that here he was to report all the facts. His power was still only advisory, and although his report of the facts would be properly taken by the chancellor to be *prima facie* correct, it would not determine the issues, or relieve the court of the duty of itself determining, with the aid of the report, and upon examination

of the evidence upon exceptions to the report, what the facts really were.

The rule was like that in *Furrer* v. *Ferris*, 145 U.S. 132, and in *Medsker* v. *Bonebrake*, 108 U.S. 66, where claims for personal injuries at a crossing of a railroad in the hands of a receiver were referred to a master "to report to this court his findings of fact and his conclusions of law thereon," with the evidence.

In these cases the entire case was referred, and the master was authorized to report *all* the facts, and did so, with the evidence. But these reports were treated as only advisory, and the court proceeded to itself examine the testimony and decide what, upon the testimony, giving due weight to the master's report as *prima facie* correct, the facts really were.

Even the verdict of a jury, to whom a petition to recover for personal injuries received on a road in the hands of a receiver is submitted, —

> "is not binding upon the judgment of the court. It is advisory simply, and the court may disregard it entirely, or adopt it either partially or *in toto*."
>
> *Kohn* v. *McNulta*, 147 U.S. 238.
> *Barton* v. *Barbour*, 104 U.S. 126.

See, also,

> *Idaho &c. Company* v. *Bradbury*, 132 U.S. 509.

Even in a case where, by agreement of parties, a master was ordered to "*decide* all the issues between the parties," and given "power to hear and *determine* said issues, with authority to *grant amendments*, exceptions, and motions, as might be granted by the court if the trial was by the court,"

and directed to report the evidence, his report was treated only as —

> "so far correct and binding as not to be disturbed unless clearly in conflict with the weight of the evidence upon which they were made."
>
> *Kimberly* v. *Arms*, 129 U.S. 512, 525.

And the court in that case proceeded to examine the testimony and decide whether there was sufficient evidence to justify a disregard of the master's findings. In other words, the court proceeded to itself determine the issue, taking the facts found by the master to be presumptively correct, but examining the evidence to see whether, upon that, they ought to be disregarded. And that is the rule in every case where a master is authorized to report as to facts, whether he be authorized to report as to one fact in issue, or as to all the facts in issue. His findings are not an adjudication of the issue, like the decision of a referee, and may be wholly disregarded by the court, if it is of the opinion, either upon the report itself or upon the evidence when reported, that they are erroneous.

> "The relief which equity affords must be applied *by the court itself*, and all information presented to guide its action, whether obtained through master's reports or findings of a jury, is merely advisory."
>
> *Basey* v. *Gallagher*, 20 Wall. 680.

It may be claimed that the order appointing the master was an interlocutory decree, which gave the defendant a new right, and put an end to the plaintiff's right to dismiss the bill, that is, took away from the plaintiff the control of its

suit as much as a decree to account, or the filing of an answer claiming affirmative relief, or a cross-bill.

It may be urged that, as the order referring the case to the master was made by the consent of the parties, "it imported into the case a new tribunal," and gave the defendant a right to have that tribunal execute its office and advise the chancellor by a report, and this was the view taken by the Court of Appeals.

But I submit, —

First. That the fact that the order was made by consent is of no consequence, because it was one which the court could have made without consent of its own motion.

Field v. *Holland*, 6 Cranch. 8, 22.

The order did not make the master a referee, but simply directed him to do what a master must always do unless restricted to a mere report of evidence, that is, hear the evidence, report his conclusions of fact, and, *ex necessitate*, his application of the law to the facts in the progress of the hearing before him, for the assistance of the chancellor.

Harding v. *Handy*, 11 Wheat. 103.
Dean v. *Emerson*, 102 Mass. 480.
Jones v. *Keen*, 115 Mass. 171, 182.

In *Burns* v. *Rosenstein*, 135 U.S. 449, the Circuit Court in the first Circuit made an order of its own motion referring the case to a master, "to hear the parties and their evidence, and report as to all issues of fact made by the pleadings."

The court not only can, but in practice frequently does, make precisely such references against the strenuous objection of one of the parties. The court had precisely the same power to make the order of reference which was made in this case that it has to direct an issue to a jury.

Verdicts on issues to a jury and references to masters are not so much for the assistance of the parties as for the assistance of the court, and a verdict may be ordered or an issue framed against the objection of either or both the parties.

McLaughlin v. *Bank of Potomac*, 7 How. 220.

Second. The order of reference did not make the master a tribunal with power to finally determine anything, but only directed him to "hear the evidence, report his conclusions of fact and rulings of law, and the evidence" for the assistance of the chancellor. The fact that he was directed to do this as to *all* the facts pertinent to the issue was of no consequence. His report could be only advisory, and it made no difference whether it was advice as to *one* fact in issue or as to *all* facts. The defendant acquired no right by the order appointing the master in this case which every defendant does not acquire by the appointment of a master to find and report any fact at issue.

This claim, therefore, necessarily amounts to this: that whenever the chancellor sends a cause, either wholly or in part, to a master to hear the evidence and report his conclusions of fact and the evidence, the defendant thereby acquires a right to have the master execute his office, and the plaintiff cannot dismiss.

In other words, the proposition is that, upon a mere order of reference of any part of an equity cause, the defendant acquires a right to have the reference carried out, and report made, and that therefore the plaintiff cannot dismiss his suit even before the hearing before the master is opened. It is obvious that, if this is the effect of a reference to a master, it is the effect of an order directing an issue to be tried by a jury, and that in such case, by the mere passing of the order,

the plaintiff is deprived of the control of the suit, and cannot dismiss.

The question, therefore, is really whether, *under the English chancery practice as it existed in* 1842, such an order of reference, or the directing of an issue, took away the right to dismiss.

Carrington v. *Holley*, Dickens, 280, before cited, is a direct authority to the point that such an order does not have this effect. There an issue to the jury had been directed, and Lord HARDWICKE said, "The directing of an issue is simply to satisfy the conscience of the court prefatory to their giving judgment," and permitted the plaintiff to dismiss.

See, also, *Bluck* v. *Colnaghi*, 9 Sim. 411, holding that a case may be dismissed after a decree merely directing inquiries. Indeed, as I have before suggested, the very fact that in 1845 the English chancery court provided that a bill should not be dismissed after it had been set for hearing by the chancellor, shows conclusively that in 1842 the mere directing an issue, or referring a question to a master for the assistance of the chancellor, did not deprive the plaintiff of the right to dismiss.

We are not called upon to argue the question whether such a reference ought to have that effect or ought not. If we were, I should confidently claim that it ought not. To say that, by the mere reference of a case to a master to find and report facts and evidence, the plaintiff loses the benefit of the well-established rule by which alone he can protect himself against accident, mistake, lack of preparation, inability to bring witnesses at the time expected, or any other thing which he may be advised renders it hazardous for him to go on, would be grossly inequitable.

I should again refer to the fundamental proposition underlying the right to dismiss, which is, that a defendant who stands in a purely defensive attitude has put nothing at risk, and can lose nothing by a dismissal of the cause, while the plaintiff has put his whole case at risk, and therefore may lose the whole question at issue in his controversy, if he is compelled to go on, while the defendant can lose nothing by being required to take his costs and a decree which leaves him precisely where he was when the suit began.

But a reference to a master of a part or all of a case, where the defendant stands in a purely defensive attitude, no more gives the defendant a right to have the master make a report than the filing of a replication by the plaintiff in equity or at law gives the defendant a right to have the court decide the issue thus joined, and therefore takes away the right of the plaintiff to dismiss or become nonsuit. There is as much reason for saying that the defendant, by answering the bill in this case, acquired a right to have the court adjudge the cause, as there is for saying that by the formal reference to the master it acquired a right to have the master find the facts and report them to the court. No such effect has ever been given even to a reference to arbitration, unless it was by agreement that the arbitrator might proceed *ex parte*.

The contention of the defendant in this cause doubtless arises largely from the importance of the cause, and is made because counsel deem it important to contend for everything in a cause in which such large interests are involved.

But neither the magnitude of the cause, nor the fact that the testimony in it has been voluminous, and the proceedings before the master more or less protracted, changes the rule. On the contrary, the very importance of the litigation, the fact that the plaintiff, if it is compelled to go on with a suit which it regards as incomplete in preparation, or as being

affected by the opinions of a master, who, it thinks, may have been unconsciously biased against it, and which, for this and other reasons that counsel are not bound to disclose and the soundness of which the court is not required to try, it desires to abandon, will thereby be compelled to risk most important interests upon conditions which it believes are not fair, and upon facts which it believes are imperfect, is a controlling reason why the rule which entitles it to dismiss before decree should not be narrowly or technically construed against it.

It may be suggested that the motion to dismiss in this cause was novel and ought not to have been granted, because such a motion is not shown to have been made in any other case after a draft report, and therefore should not be allowed. To this I reply, —

First. That it is impossible to tell whether the suggestion is well founded or not, without an examination, not only of the reported cases, which are so few in number as to show that they are doubtless a very small portion of all the cases in which the plaintiff has been permitted to dismiss even against the objection of the defendant, but also of the records of all unreported cases in which bills have been dismissed.

Second. That the causes in which such a motion could be made are necessarily extremely rare, because a reference to master almost invariably *follows* a decree to account, or some other interlocutory decree upon a portion of the merits of the cause; so that it would only be in some rare and exceptional case that the plaintiff could, if he desired, avail himself of the right to pay the defendant's costs, lose all his own expenses, and stop his pursuit for the mere purpose of starting again under all the disadvantages caused by lapse of time after a reference to a master.

This suggestion rests upon the assumption of that *which is not shown and cannot be assumed.*

It cannot be assumed that the right to dismiss in the rare cases where the reference precedes an interlocutory order or decree, will result in the plaintiff's dismissing his bill after an intimation of the order of the master's opinion, either orally or by draft report, instead of filing exceptions to the final report. Nor can it be assumed that, in cases where the bill is dismissed, a new suit will be brought in another jurisdiction, or even in the same jurisdiction. Of that the court can know nothing, and is bound to know nothing.

It cannot be assumed that the taxable costs will not be an indemnity. The law assumes that they will, and there is no evidence that this case in that respect differs from any other, except in the amount of testimony and the taxable costs which the plaintiff has paid, which are undoubtedly large, but not so large as in many other cases.

It cannot be assumed that the defendant cannot procure all the testimony to meet any new cause which it has procured to meet this; and there is no proof that it cannot. But if that be so the defendant here was amply protected by the stipulation required in the decree preserving to it in any new suit *all competent and material testimony taken in this.*

The cause has perhaps been unduly elaborated by counsel on account of its pecuniary importance, but it must be governed by the same rule which governs all causes, and the discussion upon both sides ultimately comes back to the single question, *whether on June, 1, 1891, when the plaintiff offered to cease its pursuit of the defendant and to pay the defendant its costs, which it might then have taken by consenting to the allowance of the motion, but refused by objecting to it, there was in the record, or before the chancellor in any form, anything upon which he could adjudicate upon the*

merits of the cause, in whole or in part. That there was not is beyond question, and therefore the right of the plaintiff to dismiss at that time had not been lost.

III.

The decree of the Circuit Court dismissing the bill properly stated that it was without prejudice. In all cases where a bill is dismissed without an adjudication upon the merits the decree should state that it is dismissed without prejudice, or, by equivalent words, show that it was not dismissed upon the merits.

House v. *Mullen*, 22 Wall. 42.
Kendig v. *Deane*, 97 U.S. 423.
Lacassagne v. *Chapuis*, 144 U.S. 119, 126.
Swan Land & Cattle Co. v. *Frank*, 148 U.S. 603, 612.

The bill was dismissed in the circuit court below, because, as the case stood on June 1, 1891, when the complainants filed their motion to dismiss, there had been no determination of the merits, and the decree therefore properly stated that it was without prejudice. The plaintiffs had a right to have the fact properly stated in the decree that the bill was dismissed without a determination of the merits of the issue. And the omission of the court to show that fact by words of qualification, as "without prejudice," or other equivalent terms, would have been an omission of something which the Supreme Court would have corrected upon appeal.

Durant v. *Essex Company*, 7 Wall. 107, 110.

J. H. BENTON, JR.

JOHN F. DILLON,
of Counsel.

APPENDIX.

UNITED STATES OF AMERICA.

DISTRICT OF MASSACHUSETTS, ss.

I, John G. Stetson, clerk of the Circuit Court, district of Massachusetts, having the custody of its records and dockets, certify that an examination thereof shows that of the equity cases pending in this court at the time the present dockets were opened in 1874, and of all the suits since brought in this court, it appears that four hundred and eleven equity cases have been referred to masters or referees; that, in all of these cases but twenty-six, a decree or decretal order has been entered before the reference.

Of the twenty-six referred without such decree or decretal order, nine were petitions for contempt for a violation of a decree previously entered; six were petitions by defendants for separate costs under equity rule 62: two were cases for infringement of copyright, and were referred to masters to take evidence and report as to authorship of the copyrighted books; one was a bill to recover royalties under patents, and was referred, together with a suit at law between the same parties, to a referee, with power to determine all the controversies in the litigation and settle the form of the final decree in the equity cause; one was referred to a master on exceptions to the answer, for insufficiency; one was a bill to enjoin a mortgage sale, and, after a restraining order was issued, money was paid into court by one party under an agreement between the parties as to time and manner of sale, and as to the application of the money, and was, by the same agreement, referred to a master to ascertain the amount due

on the mortgage; one was referred after a hearing by the court, upon which hearing an injunction was issued; and five (of which the *Western Union Telegraph Company* v. *American Bell Telephone Company* was one) were referred to a master to find the facts and report the evidence.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court at Boston in said district, this thirtieth day of January A.D. 1892.

JOHN G. STETSON,

[SEAL] *Clerk.*